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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY and TRANSPORTATION DISPLAYS, INC.,
*Petitioners,*

*v.*

CHRIST'S BRIDE MINISTRIES, INC.,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

In this case, involving a controversial paid advertisement stating "WOMEN WHO CHOOSE ABORTION SUFFER MORE & DEADLIER BREAST CANCER. information: 1-800-634-2224" sought to be posted within stations of a metropolitan transit authority, petitioners Southeastern Pennsylvania Transportation Authority ("SEPTA") and Transportation Displays, Inc. ("TDI"), present the following questions:

1. Whether the decision below, handed down shortly after this Court's decision in *Arkansas Educ. Television Comm'n v. Forbes,* 118 S.Ct. 1633 (Opinion filed May 18, 1998) ("*Forbes*"), without citation to or discussion of *Forbes*, is inconsistent with the holding in *Forbes* that no government intent to "designate" a public forum for First Amendment purposes can be found where the government required prior permission to access the forum and the approval process was selective?

2. Whether, as the First, Third, and Seventh Circuits have held, government property that is not a traditional public forum (*e.g.,* parks, streets, sidewalks) is to be deemed "designated" as a public forum, in the absence of specific guidelines for its use, even where the government clearly reserves absolute authority over content, thereby triggering strict First Amendment scrutiny, or whether, as the Second and Ninth Circuits have held, a government reservation of absolute authority over content sufficiently evidences government intent not to designate a public forum, thereby triggering the more deferential standard applicable to a "non-public" forum?

3. Whether, as the Third Circuit held below, the fact that the government is acting in its role as proprietor of a commercial venture (rather than as regulator of speech) has no impact upon the level of scrutiny applicable to the government's selection of messages based upon content, or whether, as the Second and Seventh Circuits have held, the fact that the government is acting in its role as proprietor is "especially significant" or at least "one factor" in determining the applicable level of First Amendment scrutiny?

4. Whether the decision below is inconsistent with *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Forbes*, in determining in the alternative that in order to have acted "reasonably" even in a non-public forum, prior to invoking its contractually reserved right to decline to post a controversial advertisement claiming a link between abortion and breast cancer, the transit authority was required to provide an opportunity for the advertiser to rebut information from the Assistant Secretary of Health in the United States Department of Health and Human Services that the advertisement was "unfortunately misleading" and "unduly alarming" and did not "accurately reflect the weight of the scientific literature?"

## LIST OF CORPORATE AFFILIATES

Petitioner, Transportation Displays Inc., is a subsidiary of TDI Worldwide, Inc., which is a subsidiary of Infinity Broadcasting Corp., which is a subsidiary of CBS Corp.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Southeastern Pennsylvania Transportation Authority ("SEPTA") and Transportation Displays, Inc. ("TDI"), pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on June 25, 1998.

## OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania, having held a bench trial in a consolidated preliminary injunction hearing and trial on the merits, ruled in favor of petitioners on all claims. The Opinion of the Honorable Harvey Bartle dated August 16, 1996, is reported at 937 F.Supp. 425 and appears at App. 34a.[1] The panel opinion of the Court of Appeals for the Third Circuit reversing and remanding the district court, filed June 25, 1998, is reported at 148 F.3d 242, and is reprinted at App. 5a. The Court of

1. References herein to the appendix accompanying the Petition are denoted as "App. ___."

Appeals for the Third Circuit denied a petition for rehearing and suggestion for rehearing en banc, without opinion, by Order dated July 23, 1998, as amended by Order dated August 6, 1998. The Orders denying the petition for rehearing are printed at App. 1a - 4a.

## JURISDICTION.

The Court of Appeals entered judgment reversing and remanding the judgment of the district court on June 25, 1998. Petitioners' timely petition for rehearing, filed July 9, 1998, was denied by Order dated and entered July 23, 1998 (App. 1a), as amended by Order dated and entered August 6, 1998 (App. 3a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED.

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, codified at 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE.

The facts in this case are simple and not materially at issue. The case squarely presents an important issue involving aspects of the First Amendment "public forum" doctrine on which the circuits are sharply divided. Respondent, Christ's Bride Ministries, Inc. ("Christ's Bride"), a non-profit religious organization, brought this case against petitioner, Southeastern Pennsylvania Transportation Authority ("SEPTA"), a metropolitan transit authority serving the Philadelphia, Pennsylvania area, and its advertising licensee or agent, Transportation Displays, Inc. ("TDI"), pursuant to 42 U.S.C. § 1983, alleging a deprivation of First Amendment rights of freedom of speech and challenging petitioners' action in rejecting advertising for display throughout SEPTA's transit system advertising network at commuter and subway rail stations.

The advertisement at issue ("the Advertisement") was a paid 21" x 62" and 46" x 60" transit advertisement containing the following controversial public health claim linking abortion and breast cancer:

> "WOMEN WHO CHOOSE ABORTION SUFFER MORE & DEADLIER BREAST CANCER. information: 1-800-634-2224."

The "800" telephone number given on the Advertisement was operated by the American Rights Coalition, an organization which, in response to telephone inquiries concerning the message's public health claim, sent callers information suggesting they consider bringing medical malpractice actions against physicians who had provided abortion services.

SEPTA initially posted the Advertisement for approximately one month at more than twenty-five locations within its transit stations in the Philadelphia, Pennsylvania area, until it became aware of a letter authored by the Assistant Secretary of Health in the United States Department of Health and Human Services stating that the Advertisement was "unfortunately misleading" and "unduly alarming" and did not "accurately reflect the weight of the scientific literature." Having determined, based upon the Assistant Secretary's letter, that the Advertisement's public health claim — that there is a link between induced abortion and breast cancer — was highly controversial, SEPTA invoked its right, expressly reserved in its contract with TDI and in TDI's contract with the advertiser, Christ's Bride, to remove the Advertisement.

Although SEPTA had accepted advertising that generally touched upon the issue of abortion, no advertising on either side of the Advertisement's particular controversial public health claim had ever previously been presented or accepted by SEPTA.

**1. Proceedings Below.**

**A. The District Court.**

**1. The Complaint.**

On May 5, 1996, Christ's Bride filed a three-count complaint in the United States District Court for the Eastern District of Pennsylvania for declaratory judgment, preliminary and permanent injunctive relief to require SEPTA to re-post the Advertisement, and for compensatory damages. Respondent's complaint alleged violation of respondent's freedom of speech under the First and Fourteenth Amendments to the United States Constitution, violation of the right to equal protection of the laws, and breach of the advertising contract between TDI and Christ's Bride.

**2. The Trial.**

By agreement of the parties and Order of the district court, the hearing on Christ's Bride's application for preliminary injunction was consolidated with trial on the merits under Rule 65(a)(2), Fed.R.Civ.P. After a three-day bench trial on June 25-27, 1996, the district court on August 16, 1996, filed a Memorandum including its findings of fact and conclusions of law (reprinted at App. 34a), finding in favor of petitioners, SEPTA and TDI, and against plaintiff Christ's Bride on all counts of the complaint.

**a. District Court's Finding of a Non-Public Forum.**

The district court held that the SEPTA station advertising areas were a "non-public" forum. This determination was based on uncontradicted evidence that SEPTA reserved and exercised absolute control over every advertisement posted in its system to ensure that such advertising remained compatible with the predominant proprietary, public transit function served by its transit operations — providing a clean, inexpensive, comfortable and attractive mode of public transportation in the metropolitan Philadelphia area. Under a SEPTA/TDI contract dated July 3, 1993 ("the SEPTA/TDI contract"), as amplified by additional directives from SEPTA managers, TDI, as SEPTA's advertising agent, had the responsibility initially to review each proposed advertisement and to bring to SEPTA's attention advertisements that involved any feature that SEPTA might wish to review. The SEPTA/TDI contract expressly provided that every advertisement to be placed in SEPTA's stations was required to be acceptable to SEPTA and that SEPTA had the right to "remove" any unsuitable advertisement:

> All advertising displays at any time inserted or placed by [TDI] in any display devices in any vehicle and/or locations shall be of an appropriate character and quality, and the appearance of all displays shall be acceptable to SEPTA. No libelous, slanderous, or obscene advertising may be accepted by [TDI] for display in [SEPTA's] transit and railroad vehicles and facilities. All

> advertising shall be submitted for SEPTA's review and approval prior to display. Any advertising determined by . . . SEPTA, in its sole discretion, as objectionable within the meaning of this subsection must not be utilized on any SEPTA vehicle or facility. SEPTA shall have the right to immediately remove any advertising material which has already been applied, in the event that. . . SEPTA deems material objectionable for any reason. . . .

¶ 5(a), App. 20a. Uncontradicted record evidence established that TDI had likewise specifically reserved the right to cancel its contract with each would-be advertiser in the event SEPTA exercised its right to require removal of a proposed advertisement. Thus, the TDI/Christ's Bride contract stated that, if SEPTA "should deem the advertising objectionable for any reason," TDI shall have the right to cancel the contract. ¶ IV(b), App.10a. Uncontradicted evidence established that, on specific prior occasions, SEPTA had, in fact, invoked this contractual right and had declined to post proposed advertising materials it found unsuitable for its transit stations or transit vehicles. The trial record included evidence of a few of these instances as examples.

Applying the teachings of *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), to the record, the district court determined that SEPTA's transit advertising space was a "non-public" forum. The trial court found that SEPTA exercised "firm control" over these areas. App. 40a. Moreover, the trial court found that SEPTA's role in reviewing and permitting advertisements for posing "is not merely perfunctory." App. 40a. Accordingly, the trial court held that SEPTA "has not created a public forum in its subway and train stations." App. 41a.

**b. District Court's Finding of Reasonableness and Viewpoint-Neutrality.**

The district court also determined that SEPTA's rejection of the Christ's Bride advertisement was a reasonable and viewpoint-neutral action with regard to what it determined to be a non-public forum. Respondent presented no evidence at trial that SEPTA had ever rejected any proposed advertising

materials based upon the advertisement's viewpoint on the abortion debate. In fact, as the district court stated, "SEPTA has permitted advertising in subway and rail stations on both sides of the abortion debate." App. 47a. The district court stated: "On the issue of abortion SEPTA has been 'viewpoint neutral.'" App. 47a.

The district court also determined that SEPTA's decision not to continue to display the Advertisement was "reasonable." Uncontradicted evidence established that SEPTA made its decision to remove the Advertisement when it became aware of a letter authored by the Assistant Secretary of Health, United States Department of Health and Human Services, addressed to the Washington Metropolitan Area Transit Authority ("the HHS letter"), which stated that the Advertisement's copy was "misleading" and "unduly alarming" and did not "accurately reflect the weight of the scientific literature." App. 42a. The district court held it was reasonable for SEPTA to have considered and given weight to the HHS letter in determining that the subject matter was inappropriately controversial, and therefore unsuitable for display, as a basis for invoking its right to terminate the contract relating to display of the Advertisement.

**B. The Court of Appeals.**

The Court of Appeals rejected the district court's determination that SEPTA's transit advertising spaces constituted a "non-public" forum, instead determining, notwithstanding the contractual right to remove and the review procedure established, that SEPTA had nonetheless "designated" the advertising space as an open public forum for expressive activity on the broad subject of "abortion." The Court of Appeals held that SEPTA was therefore without power to screen advertisements unless SEPTA's actions withstood "strict scrutiny" under the First Amendment. App. 29a. It rejected the district court's determination that SEPTA was reasonable in terminating the advertising contract. The Court of Appeals did not reach the issue of viewpoint-neutrality.

The Court of Appeals disregarded SEPTA's proprietary (not regulatory) status and the uncontradicted evidence (i) that SEPTA expressly reserved by contract its right to review

and to reject proposed advertising materials it found objectionable; (ii) that SEPTA and its licensee reviewed every proposed advertisement to determine compatibility for posting in SEPTA's transit advertising space; and (iii) that SEPTA had in fact invoked its contractual right and declined to post unsuitable proposed advertising on prior occasions.

Because of the breadth of SEPTA's discretion, the Court of Appeals gave no weight to SEPTA's contractual reservation of rights as evidence of SEPTA's intent to control access to the forum. Joining the Courts of Appeals for the First and Seventh Circuits, and contrary to the decisions of the Courts of Appeals for the Second and Ninth Circuits, the Court of Appeals for the Third Circuit in this case erroneously confused and conflated the question of "intent" to designate a public forum with the unrelated question whether specific guidelines, adopted in advance, constrained SEPTA's exercise of discretion to reject proposed advertising. Relying upon an assortment of concurring and dissenting opinions rather than majority opinions of this Court, the Court of Appeals reasoned that even the undisputed prior exercise of absolute control and specific reservation of authority to reject advertising was insufficient to negate an intent to "designate" government property as a public forum, unless there were also evidence of "particular standards and goals" (App. 21a):

> [T]he fact that SEPTA has reserved for itself the right to reject ads *for any reason at all* does not signify, in and of itself alone, that no public forum has been created . . . [T]he fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum. If anything, we must scrutinize more closely the speech that the government bans under such a protean standard. (emphasis original).

In rejecting as inconclusive the record evidence of SEPTA's intent, the Court of Appeals also discounted and disregarded SEPTA's role as operator of a commercial venture, exercising its managerial judgment to select advertising consistent with its goal of providing safe, comfortable and pleasant

public transportation attractive to its patrons. In so reasoning, the Court of Appeals ignored the teaching of this Court in *Lehman* that where the government "is engaged in commerce," attempting to "provide rapid, convenient, pleasant, and inexpensive service to . . . commuters," and where the advertising space is "incidental to the provision of public transportation," a "city transit authority has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles." 418 U.S. at 303. The Court of Appeals also discounted this Court's teaching in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992), that "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate and license, its actions will not be subjected to the heightened review to which its actions as a lawmaker may be subject." The Court of Appeals in this case ultimately gave no effect to the proprietary factor in its analysis.

In reversing the district court's non-public forum determination, the Third Circuit panel also overlooked or ignored this Court's teaching in *Arkansas Educ. Television Comm'n v. Forbes*, 118 S.Ct. 1633 (1998), decided shortly before the Third Circuit's decision in this case, in which this Court made it clear that "the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." 118 S.Ct. at 1642 (internal citations omitted). Although petitioners brought this Court's decision in *Forbes* to the Court of Appeals' attention as requiring rehearing, rehearing was denied without opinion. App. 1a.

The Court of Appeals additionally questioned the district court's determination that SEPTA had acted "reasonably." In *Cornelius*, this Court said that the "government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation," 473 U.S. at 808, a principle recently reaffirmed in *Forbes* (finding reasonable the exclusion of a political candidate lacking popular support from a televised debate). Never-

theless, the Court of Appeals in this case measured the reasonableness of SEPTA's judgment concerning use of its property under a more exacting legal standard. Curiously, the Court of Appeals (App. 33a) faulted SEPTA for not providing Christ's Bride an opportunity to rebut the statements in the HHS letter that the Advertisement was "misleading" and "unduly alarming" and that it did not "accurately reflect the weight of the scientific literature":

> Having decided to exclude the posters on [the] basis [that they were unacceptably misleading], SEPTA did not act reasonably when it failed to ask CBM to clarify the basis on which the claim was made.

In determining that SEPTA had acted "unreasonably," the Court of Appeals once again faulted SEPTA for failing to adopt specific guidelines for acceptable advertising, conflating and confusing this unrelated question with the inquiry into whether SEPTA "reasonably" excluded the controversial Advertisement. Thus, the Court below concluded that SEPTA's unreasonableness was "all the more true" where "there is *no policy*, old or new, written or unwritten, governing the display of ads making contested claims." App. 33a (emphasis supplied).

Compounding these errors, the Court of Appeals overlooked or gave no weight to the teaching of *Cornelius* that "avoidance of controversy" is by itself a sufficient justification for exclusion of speech from a non-public forum. 473 U.S. at 811.

## REASONS FOR GRANTING THE WRIT.

### I. The Court Should Grant The Writ, Vacate, And Remand For Further Proceedings In Light Of This Court's Decision Last Term In *Arkansas Educ. Television Comm'n v. Forbes*, 118 S.Ct. 1633 (1998).

Certiorari should be granted to vacate and remand for further consideration in light of this Court's decision in *Forbes*. Within weeks of the Court of Appeals' decision of these issues in this case, this Court in *Forbes* made it clear that where access to government property is "selective," with "permis-

sion" required, there is no demonstrated "intent" to designate a public forum. *Forbes* is squarely applicable and irreconcilably inconsistent with the decision below. As this Court stated in *Forbes*:

> The [ ] cases illustrate the distinction between *'general access,'* which indicates the property is a designated public forum, and *'selective access,'* which indicates the property is a non-public forum. On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers, as the university made its facilities generally available to students in *Widmar [v. Vincent*, 454 U.S. 263 (1981)]. On the other hand, the government *does not create a designated public forum* when it does no more than *reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission,' to use it.* For instance, the Federal Government did not create a designated public forum in *Cornelius* when it *reserved eligibility* for participation in the CFC charity drive to charitable agencies, and then made *individual, non-ministerial judgments as to which of the eligible agencies would participate.* 118 S.Ct. at 1642 (emphasis supplied) (internal citations omitted).

Under this standard, SEPTA's written reservation of the right to reject inappropriate proposed advertisements conclusively negated any intent to "designate" its transit advertising network as a public forum. The Court of Appeals erroneously rejected SEPTA's contention below, misreading *Cornelius* and *Perry*, overlooking *Forbes*, and subsequently refusing to rehear the case in light of *Forbes*, neither distinguishing, discussing nor even citing this recent controlling precedent.

SEPTA's policy of opening its property — not *"generally"* — to *all* willing to pay the requisite fee, but rather *"selectively," i.e.*, only to those (a) willing to pay the requisite fee, and (b) who propose advertisements deemed suitable for posting in SEPTA's transit spaces, is precisely the fact pattern this Court held in *Forbes* fails to support a conclusion finding a public forum: "A designated public forum is not created when

the government allows *selective access* for *individual speakers* rather than *general access* for a *class of speakers*." 118 S.Ct. at 1642 (emphasis supplied).

Under the principles reaffirmed in *Forbes*, the Third Circuit's reasoning is incorrect. This Court should grant the writ, vacate, and remand to the Court of Appeals for further consideration in light of this Court's recent decision in *Forbes*, which is neither cited nor discussed in the Court of Appeals' opinion below.

## II. The Court Should Grant The Writ To Resolve A Split Of The Circuits, To Clarify The Principles Applicable In Determining Government "Intent" To Designate A Public Forum, And To Clarify The Significance, If Any, Of Government's Reservation Of Absolute Authority To Select Among Messages Based Upon Content.

Uncontradicted record evidence established that SEPTA had reserved by written contract the right to approve all proposed advertising materials and to reject those deemed objectionable.[2] The Court of Appeals failed to give weight to SEPTA's express reservation of rights as evidencing intent not to designate a public forum, however, in large part because of the *scope of the discretion retained by the transit authority.* Thus, the Court below said (App. 21a):

> [T]he fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum.

In fact, in the Court of Appeals' analysis, a broad reservation of rights was held to require an even more searching inquiry, and to call for application of the stricter scrutiny applicable only to government restriction of speech in a public forum. Thus, the Court below held: "If anything, we must scrutinize more closely the speech that the government bans under such a protean standard." App. 21a.

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2. On this ground, SEPTA examined the color, size, graphics and general content (as distinguished from viewpoint) in determining suitability and compatibility of proposed advertising.

The circuits are sharply divided on precisely this question. The Second and Ninth Circuits, strictly following *Perry* and *Cornelius*, assess evidence regarding government intent to create a public forum without regard to the breadth of discretion retained by government. *Lebron v. National Railroad Passenger Corp.*, 69 F.3d 650 (2d Cir.), *amended on denial of rehearing*, 89 F.3d 39 (2d Cir. 1995); *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991) (*en banc*).

Other circuits, including the Third Circuit in this case and the First and Seventh Circuits, apply *Perry* and *Cornelius* differently and refuse to defer to an otherwise demonstrated absence of intent to designate government property for public discourse if the government has retained broad discretion in selecting among messages based on content. *Planned Parenthood Ass'n of Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985); *Yeo v. Town of Lexington*, 1997 WL 292173 (1st Cir.), *opinion withdrawn on grant of rehearing en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2060 (1998).

Alternatively, because of the unresolved confusion on this important — frequently decisive — legal principle, lower courts have searched for alternative grounds on which to decide cases in order to avoid altogether a decision based on this troublesome issue. Thus, the Court of Appeals for the First Circuit, noting the "relatively *murky status* of the public forum doctrine" in *AIDS Action Committee of Massachusetts, Inc. v. Massachusetts Bay Transportation Authority*, 42 F.3d 1 (1st Cir. 1994), deliberately avoided deciding whether a transit advertising space was a public forum, and instead rested its decision upon an expanded notion of viewpoint discrimination. It held that the transit authority's rejection of a public service advertisement about AIDS that employed sexual innuendo and *double entendre* gave rise to an impermissible "appearance" of "viewpoint discrimination," because the transit authority had previously allowed a commercial movie advertisement that also employed sexual innuendo and *double entendre*.

At least three circuits have specifically commented on "muddied," or "murky" status of the public forum doctrine and have noted the need for definitive guidance from this Court. *See, e.g., AIDS Action Committee,* 42 F.3d at 9 (noting "*murky status* of the public forum doctrine"); *Jacobsen v. United States Postal Service,* 993 F.2d 649, 655 n.2 (9th Cir. 1992) (noting public forum jurisprudence now "*quite muddied*"); *Fighting Finest, Inc. v. Bratton,* 95 F.3d 224, 229 (2d Cir. 1996) (Supreme Court has sent somewhat "*mixed signals*" as to public forum criteria).

The current confusion regarding the principles governing the determination whether a "public forum" has been designated in transit authority and government advertising space cases, such as this one, presents perhaps the clearest example of circuit conflict in this field of First Amendment litigation. *See* S. Gey, "Reopening the Public Forum- From Sidewalks to Cyberspace," 58 Ohio St. L. J. 1535, 1554 (1998) (post-*Perry* public forum doctrine among the "most *fractured area* in modern constitutional law," and examining cases dealing with government "in its role as *proprietor of advertising space*"); Note: A Procedural Approach to Limited Public Forum Cases, 22 Fordham Urb. L. J. 1255, 1274 (Summer, 1995) (discussed under heading "*Lower Court Confusion: The Subway*"). These public forum cases have yielded inconsistent, doctrinally irreconcilable results, and exhibit all the symptoms of circuit confusion: fractured panel decisions, frequent amended opinions, vacate orders, and withdrawal orders upon rehearing *en banc* and rehearing. Definitive guidance is needed at this time on this important, frequently recurring issue of First Amendment litigation.

For example, the Second Circuit in *Lebron v. National Railroad Passenger Corp.,* 69 F.3d 650 (2d Cir.), *amended on denial of rehearing,* 89 F.3d 39 (2d Cir. 1995), dealt with an issue of denial of access to transit advertising space similar to the issue here and reached a contrary result. The question presented was whether the "Spectacular" billboard in New York's Pennsylvania Station was a public or non-public forum. Amtrak, as proprietor of advertising space at the station, had provided in its written advertising agreement with TDI (TDI,

SEPTA's licensee, is also a petitioner in this case) that all advertising materials "shall be *subject to approval by Amtrak*," and that Amtrak "*may disapprove any such items at its own discretion.*" 69 F.3d at 653. The terms of the Amtrak/TDI contract closely parallel those of the SEPTA/TDI contract involved in this case. Correctly restating the test this Court articulated in *Cornelius* and *Perry*, the Second Circuit stated that "where only some First Amendment access has been granted, the reasonableness test" applies because there has been no purposeful dedication of a public forum. 69 F.3d at 656. The Court accordingly held that the billboard is a nonpublic forum.[3] The Second Circuit's decision in *Lebron* cannot be reconciled with the Third Circuit's decision in this case.

The Ninth Circuit's *en banc* decision in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991), reads *Perry* and *Cornelius* in a similar way. Student publications, including high school newspapers, yearbooks, and athletic programs, had reserved the right to reject controversial advertising materials. The majority said that it "must assume that school-sponsored publications are nonpublic and that unless the schools affirmatively intend to open a forum for indiscriminate use," no public forum had been designated. 941 F.2d at 819. Consistent with the principle the Second Circuit applied in *Lebron*, and finding the publications' intent "most clearly evidenced by *written policies that explicitly reserve the right to control content*," the Ninth Circuit majority opinion in *Planned Parenthood* determined that, although Planned Parenthood may have been the first, or only, excluded advertiser, the schools did not grant permission to advertise "as a matter of course," and there was "nothing in *Perry* or *Cornelius* to support a conclusion that

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3. *Lebron* was a fractured panel decision. Dissenting, in terms reminiscent of the panel's decision in this case, Judge Newman stated the "vice" of "unfettered discretion" "inheres in the opportunity for discrimination, and the First Amendment requires that opportunity to be held to an acceptable minimum by a clear and well understood policy that appropriately limits the discretion of the officials who must administer it." 69 F.3d at 662.

allowing some outside organizations to advertise converts the school-sponsored publications into public forums." 941 F.2d at 826.

Further demonstrating the instability of precedent in this area, *Planned Parenthood* was also a sharply divided *en banc* decision. The four-judge dissent expressly criticized the notion —rejected by the Third Circuit panel in this case — that "so long as officials reserve for themselves broad discretion to control content, then they will be deemed to have 'intended' to create a nonpublic forum[.]" 941 F.2d at 836. The same theme echoes the words of Judge Newman, dissenting in *Lebron*, and Mr. Justice Stevens (joined by Justices Souter and Ginsburg), dissenting last term in *Forbes*, 118 S.Ct. at 1644, 1647 ("In its discussion of the facts, the Court barely mentions the *standardless* character of the decision to exclude Forbes from the debate. . . . [A] state's failure to set any *meaningful boundaries* at all cannot insulate the State's action from First Amendment challenge").

In sharp contrast with the Ninth Circuit *Planned Parenthood* decision, the Seventh and First Circuits — and now the Third Circuit in this case — reject a reading of *Perry* and *Cornelius* that would find a forum non-public if broad discretion to keep objectionable messages out of the forum is retained by government. Thus, in this case, the Third Circuit expressly agreed with the Seventh Circuit's analysis in *Planned Parenthood Ass'n of Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985) ("*Planned Parenthood (Chicago)*"). Like SEPTA, the Chicago Transit Authority contractually reserved its right to reject proposed advertising. Nonetheless, the Seventh Circuit found the transit authority display areas to have been designated as a "public forum," basing its reasoning, once again, on expressed dissatisfaction with the fact that the transit authority evidenced "no policy at all" for advertisement rejection. 767 F.2d at 1233. Thus, the strict scrutiny standard applicable only to a public forum was smuggled into the analysis for determining whether the forum was a public forum or a non-public forum.

The First Circuit, in a recent divided panel decision, also rejected the deferential interpretation of *Perry* and *Cornelius*

and sided with the Third and Seventh Circuits on precisely this issue. In *Yeo v. Town of Lexington*, 1997 WL 292173 (1st Cir.), *opinion withdrawn on grant of rehearing en banc*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2060 (1998), advertisements urging abstinence were rejected for publication by a student newspaper and yearbook. Both student publications maintained the policy that all ads are subject to final approval by the editorial boards. The First Circuit majority squarely rejected the Ninth Circuit's *Planned Parenthood* decision. The Court read this Court's decision in *Perry* as not holding that government can argue that it "only intended to open the forum to messages that [it] alone were to deem appropriate and acceptable." 1997 WL at * 11. The dissent (Lynch, J.) disagreed, stating, "The record here indicates that the students' very strong intent was to avoid creating a public forum, or a 'bulletin board' as they termed it, on the [newspaper's] advertising pages." 1997 WL at *31.

The decisions of the First, Third and Seventh Circuits in *Yeo, Christ's Bride* and *Planned Parenthood (Chicago)*, respectively, squarely conflict with the decisions of the Second and Ninth Circuits in *Lebron* and *Planned Parenthood* that make government intent the touchstone of the designated public forum inquiry. The question of the role played in the forum analysis of the government's retention of broad discretion to select among messages based upon content has divided the circuits and has led to continuing, logically inconsistent results in application of the public forum doctrine.

Certiorari should be granted to resolve this conflict among the circuits on an important, frequently recurring issue of First Amendment jurisprudence, the principles applicable to ascertaining government intent with respect to its property.

## III. The Court Should Grant The Writ To Clarify The Weight To Be Accorded Government's Proprietary Status In Determining Intent To Create A Public Forum, A Question On Which The Circuits Are Divided.

The district court accepted SEPTA's contention that an important factor in the public forum "intent" inquiry is the fact that SEPTA's actions were those of the government as

proprietor of a commercial venture, not the government as regulator of speech or expressive activity, and the incompatibility of a public forum with the dominant function or use of the property the government supervises in its proprietary role.

Here, the Court of Appeals rejected the notion of a "bright-line" rule in cases where the government is running a commercial operation (App. 18a), and found no occasion further to consider the importance of the proprietary nature of the transit venture. Accordingly, it failed to accord it any weight whatsoever in its analysis of SEPTA's intent.

In so holding, the Court of Appeals ignored the teaching of *International Society for Krishna Consciousness, Inc v. Lee,* 505 U.S. 672 (1992) (Rehnquist, C.J.), that where the government acts as proprietor, "strict scrutiny" is not the applicable standard of First Amendment review:

> Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action *will not be subjected to the heightened review to which its actions as a lawmaker may be subject.* 505 U.S. at 678 (emphasis supplied).

Similar statements appear in plurality decisions in *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (O'Connor, J.) ("It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating. . . [is] not the power to regulate or license, as lawmaker, . . . but rather, as proprietor, to manage [its] internal operation[s]. . .")(quoting *Cafeteria & Restaurant Workers v. McElory*, 367 U.S. 886, 896 (1961)), and *Lehman v. City of Shaker Heights*, 418 U.S. 299 (1974) (Blackmun, J.) ("Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. . . a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles").

In spite of this Court's sharp distinction between the government as proprietor and the government as regulator of speech in defining the applicable level of judicial review, the Court of Appeals in this case selected "heightened" scrutiny as the applicable standard of review.

The courts of appeals in mass transit advertising cases have sharply divided on this very issue, involving the significance of the fact that government is acting as proprietor of a commercial venture in deciding the public forum "intent" issue. The Third Circuit gave no effect at all to SEPTA's proprietor status. Likewise, in a recent decision, the Second Circuit Court of Appeals in *New York Magazine v. The Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir.), *cert. denied*, 66 U.S.L.W. 3801 (1998), gave no effect to the proprietary nature of the transit venture. In that case, the advertising standard at issue was an advertising standard that barred display of the proposed advertisement as violative of New York law (regarding invasion of the right of privacy and publicity). The Court attempted to distinguish this Court's landmark public transit advertising decision in *Lehman*, reasoning that there was "no commercial reason" why MTA, although a proprietor of the advertising space, would have any special interest in the policy behind New York privacy and publicity law that formed the basis for its rejection of the advertisement at issue. 136 F.3d at 130.[4]

Yet a third conflicting approach is reflected in the Seventh Circuit's decision in *Air Line Pilots Ass'n v. Department of Aviation of the City of Chicago*, 45 F.3d 1144 (7th Cir. 1995), which involved the exclusion, on content grounds, of a proposed advertisement from a diorama display case in Chicago's O'Hare Airport. The Seventh Circuit stated that a "proprietary role is *one factor* to be considered in determining

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4. By contrast, and once again illustrating the confusion that permeates the public forum decisions on this point, the Second Circuit panel in its earlier decision in *Lebron* gave dispositive weight to the fact that Amtrak's challenged actions were in its capacity as proprietor of commercial advertising space. Citing *Lehman* and quoting *Lee*, the Second Circuit panel in *Lebron* found it "*especially significant*" that "Amtrak acts in this case in a proprietary capacity, rather than as a governmental regulator." 69 F.3d at 657.

whether a public forum was intended." 45 F.3d at 1158. That Court found more important in determining the City's intent the evidence of "consistent practice and past policy," an inquiry the district court was directed to make on remand. 45 F.3d at 1158.

Despite this Court's decisions in *Lee, Kokinda*, and *Lehman*, the circuits remain divided on the significance, if any, to be accorded to the government's role as proprietor of advertising spaces in conducting the inquiry to determine whether the government intended to designate a public forum.

Legal commentators agree that definitive guidance from this Court is required to settle the "chaotic" confusion in the lower courts in this important area of recurring First Amendment litigation. *See generally*, "Comment: Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society for Krishna Consciousness, Inc. v. Lee," 59 Brooklyn L.Rev. 1271 (Fall, 1993) (after *Lee*, "public forum doctrine in a *state of chaos*," and it is "virtually impossible for a government or lower court to determine what principles now govern speech restrictions on government property"); "Comment: 'Objective' Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery," 90 N.W.U. L. Rev. 1185 (1996) (noting pre-*Lee* *"confusion among lower courts* attempting to discern reliable guiding principles from the Court's public forum decisions").

The Court should grant the petition for a writ of certiorari to resolve the circuit conflict and to clarify the First Amendment principles applicable in the public forum analysis where the government acts in a proprietary role, an issue squarely presented by the Third Circuit's erroneous rejection of this factor in this case.

## IV. The Court Should Grant The Writ Because The Decision Below Is Inconsistent With This Court's Decisions In *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* And *Forbes*, With Respect To The Standard Of Reasonableness Applicable In Non-Public Forums.

The Court of Appeals in this case disagreed with the district court in determining that in declining to continue to post

the Advertisement, SEPTA and TDI acted "unreasonably" and offended First Amendment principles, even in a nonpublic forum. The crux of its disagreement is the proposition that SEPTA was "unreasonable" in failing to afford Christ's Bride some additional opportunity to support the accuracy of the claim it made in its posters concerning the alleged link between abortion and breast cancer, which had been questioned by other informed and presumably expert public health officials as "unfortunately misleading" and "unduly alarming," and "not accurately reflect[ing] the weight of the scientific literature."

This aspect of the Third Circuit panel decision is clearly inconsistent with this Court's decisions in *Cornelius*, 478 U.S. at 811, and *Forbes*, 118 S.Ct. at 1643-44, which (1) define a far more deferential standard with respect to the issue of "reasonableness," and (2) expressly hold that "avoidance of controversy" is a constitutionally permissible basis upon which the government may restrict access to a nonpublic forum.

The writ should be granted in this case because this aspect of the Court of Appeals' decision squarely conflicts with this Court's precedents defining the applicable standard of reasonableness, and determining that "avoidance of controversy" incompatible with the proprietary use of government-owned property provides a reasonable basis for government action, as long as the government's action remains viewpoint-neutral.

## CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1829

CHRIST'S BRIDE MINSTRIES, INC.,

*Appellant.*

*v.*

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; TRANSPORTATION DISPLAY'S INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-03631)

Argued May 21, 1997

Before: SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, and WEIS[1],
*Circuit Judges*

ORDER

The petition for rehearing *in banc* filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and all judges who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

[1] Honorable Joseph F. Weis's, Senior Circuit Court Judge, vote is limited to panel rehearing only.

service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

Dated: JUL 23, 1998

Circuit Judge

UNITED STATIES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1829

CHRIST'S BRIDE MINISTRIES, INC.,

*Appellant.*

*v.*

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; TRANSPORTATION DISPLAY'S INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-03631)

Argued May 21, 1997

Before: SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, and WEIS[1], *Circuit Judges*

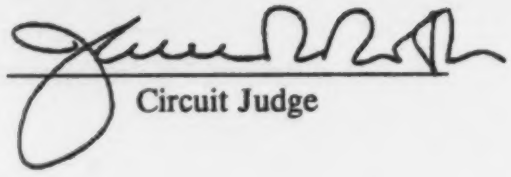
AMENDED ORDER

The petition for rehearing *in banc* filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regu-

[1] Honorable Joseph F. Weis's, Senior Circuit Court Judge, vote is limited to panel rehearing only.

lar active service not having voted for rehearing by the court *in banc,* the petition for rehearing is denied.

By the Court,



Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 96-1829

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CHRIST'S BRIDE MINISTRIES, INC.,

*Appellant.*

*v.*

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; TRANSPORTATION DISPLAY'S INC.

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-0363 1)

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Argued May 21, 1997

Present: Greenberg, Roth and Weis, *Circuit Judges*

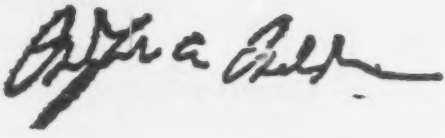
JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 21, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 16, 1996, be, and the same is hereby reversed and the cause is remanded to the District Court for further proceedings consistent with this opinion. Costs taxed

against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:



Chief Deputy Clerk

Dated: June 25, 1998

Filed June 25, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 96-1829

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CHRIST'S BRIDE MINISTRIES, INC.,

Appellant

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; TRANSPORTATION DISPLAY'S INC.

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-03631)

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Argued May 21, 1997

Before: GREENBERG, ROTH and WEIS, *Circuit Judges*

(Opinion Filed June 25, 1998)

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**OPINION OF THE COURT**

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ROTH, *Circuit Judge:*

Southeastern Pennsylvania Transportation Authority (SEPTA) refused to display an advertisement stating that "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer." We must decide in this appeal whether, in doing so, SEPTA, a regional transportation authority, violated the First Amendment rights of the advertiser, Christ's Bride Ministries, Inc. (CBM). The district court

found, after conducting a bench trial, that the First Amendment was not violated because the advertising space at issue did not constitute a public forum and because SEPTA acted reasonably in removing the posters. We do not agree with either conclusion. In light of the other advertisements, including those relating to abortion, which SEPTA had previously permitted to run on its property, and in light of SEPTA's own purposes in using and leasing the space, we have determined that SEPTA intended to create a designated public forum. We find that SEPTA's action in removing the posters does not survive the strict scrutiny applied to speech within the parameters of a designated public forum; nor does it pass the reasonableness test applied where property of a governmental agency has not been designated a public forum.

## I. Background

SEPTA is an "agency and instrumentality" of the Commonwealth of Pennsylvania, 74 Pa. Cons. Stat. Ann. § 1502. It operates buses, subways, and regional rail lines in and around the City of Philadelphia. SEPTA contracts with a licensee, Transportation Display's Inc. (TDI), for the construction and sale of advertising space in its stations and in and on its vehicles. TDI and SEPTA are the defendants in this case.

The plaintiff, CBM, began a public service campaign in 1995 to inform the public of what it believes to be the increased risk of breast cancer for women who have had abortions. As part of this campaign, CBM sought to display posters in train and subway stations and on buses and at bus stops in major urban areas, including Baltimore, Washington, and Philadelphia.

CBM contacted SEPTA in late November 1995 about placing posters in the Philadelphia area transit system. SEPTA referred CBM to TDI. Bradley Thomas, president of CBM, subsequently spoke with Robert R. Meara, Vice President and Regional Manager at TDI. In December 1995, Thomas sent a draft poster to TDI for review by Meara and SEPTA. The poster stated "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer." The district court described the poster as "graphically designed with bold

white lettering on a background of black and bright red, except that the word 'deadlier' was written in red." The poster also included a 1-800 number for information which connected callers not with CBM but with an organization called the American Rights Coalition (ARC).

SEPTA requested that the poster better identify the sponsor, CBM CBM complied and added a description of CBM· "Christ's Bride Ministries, Inc. is a charitable, religious, educational, non-profit 501(c)(3) organization CBM, P.O Box 22 Merrifield, VA 22116. (703) 598-2226." SEPTA then approved the posters for display.

On January 15, 1996, the posters went up. TDI put two of them next to overhead clocks in Suburban Station in Philadelphia, and 24 others in subway and railroad stations in Philadelphia and its suburbs. SEPTA immediately began receiving what it described as "numerous" complaints about the poster, which included "rider protest" and "criticism" by "women's health organizations" and "local government officials." Shortly thereafter, Robert Meara told CBM that SEPTA wanted CBM to identify itself more prominently on the posters CBM accordingly added decals to the signs that identified and described CBM with larger and bolder type

After the posters were installed, TDI faxed to CBM a contract, which Thomas signed and returned to TDI, also via fax The contract was signed by Robert Meara of TDI and dated January 22, 1996. The contract provided that 46″ x 60″ posters would be displayed at 24 locations in rail stations for one year. The contract also stated that during that year two 21″ x 62″ signs would be displayed on clocks at Suburban Station. The monthly charge for the signs on the clocks was $642 60, while the monthly charge for the 24 other posters was $2400. There were "terms and conditions" on the back of the contract, including one that stated "if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice."

In early February, SEPTA received a copy of a letter written by Dr. Philip Lee, Assistant Secretary of Health in the United States Department of Health and Human

Services. The letter was not addressed to anyone in SEPTA, but instead to Lawrence Reuter, General Manager of the Washington Metropolitan Area Transit Authority, where CBM's posters were also displayed. Dr. Lee wrote to Reuter that

> It has recently come to my attention that the Metro Transit System has posted more than 1,100 free public service ads from the Christ's Bride Ministries. The ad states: "Women who choose abortion suffer more & deadlier breast cancer. Information: 1-800-634-2224." This ad is unfortunately misleading, unduly alarming, and does not accurately reflect the weight of the scientific literature.

Dr. Lee went on to state that in his opinion the studies showing a link between breast cancer and abortion suffered from methodological weaknesses, that there was no consensus on the purported relationship between breast cancer and abortion, and that Dr. Lee knew of no evidence supporting the claim that abortion causes "deadlier" breast cancer. Dr. Lee also complained that callers to the 1-800 number were referred to an article in the *Journal of the National Cancer Institute*, describing a study that suggested a positive correlation between induced abortions and breast cancer. Dr. Lee noted that although the article did appear in the *Journal*, the *Journal* also published an editorial stating that the results were not "conclusive." Finally, Dr. Lee expressed concern that callers to the 1-800 number were being asked to participate in a survey and that callers could become confused and think that the National Cancer Institute supported the survey, which it did not.

Based on Dr. Lee's letter, SEPTA removed the posters on February 16, 1996. According to the testimony of Mr. Gambaccini, SEPTA's General Manager, the "heart" of the decision to remove them was the questions about their accuracy. The 1-800 number concerns were an "ancillary" consideration. It is uncontested that no one at SEPTA or TDI conducted any other inquiry into the accuracy of the message on the poster, or contacted CBM for information that would support the claim made by the ad, or informed CBM of SEPTA's objections to the ad before removing the posters.

On March 13, 1996, nearly a month later, Meara of TDI wrote to Thomas of CBM, explaining that the posters had been removed on February 16. Meara stated in his letter that the decision had been made by SEPTA as a result of "a letter from the U.S. Department of Health and Human Services in which it concluded that the ad was 'unfortunately misleading, unduly alarming and does not accurately reflect the weight of the scientific literature'." TDI included a check to CBM for $3,042.60 for the "unused portion" of the contract. CBM had paid a total of $6,086 for two months of advertising.

CBM filed suit on May 10, 1996, naming SEPTA and TDI as defendants. The complaint alleged violations of CBM's rights under the First and Fourteenth Amendments and also alleged breach of contract. CBM sought compensatory damages and declaratory and injunctive relief pursuant to 42 U.S.C. §§ 1983, 1985(c) and 1986.[1] The United States District Court for the Eastern District of Pennsylvania conducted a three-day bench trial in June 1996. The court heard testimony about SEPTA's and TDI's policies and practices regarding advertising space on SEPTA property, as well as testimony from experts about the alleged link between breast cancer and induced abortions.

During the trial, three experts testified that the existing studies and research do not support the existence of a cause and effect relationship between abortion and breast cancer. These experts did, however, acknowledge that some studies show a weak "association" between induced abortions and breast cancer. One of SEPTA's experts

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1. CBM has not appealed the district court's rejections of its claims under 42 U.S.C. §§ 1985 and 1986. CBM has, however, objected to the district court's denial of its breach of contract claim. It argues that it only received one page of the two page contract and that there was no "meeting of the minds" as to the terms of the contract between it and TDI. The complaint does not make this allegation, however. CBM also attached both pages of the contract to the complaint and relied on language from the allegedly missing second page in the complaint itself. CBM also argues that the contract is "unconscionable," although the complaint makes no such allegations. We reject these claims as being without merit.

testified that the better studies have not been consistent and that some studies show no link at all.

CBM's expert, on the other hand, testified that he had analyzed 23 epidemiological studies, 12 of which, in his opinion, showed a statistically significant increase in breast cancer among women who had undergone induced abortions. He argued that this risk could not be accounted for by the presence of other variables, such as age or family. The increased risk, CBM's expert noted, was greater than the relative risk associated with oral contraceptives. Because manufacturers of contraceptives alert the public as to the possible link between their product and breast cancer, it should not be "unduly alarming" for CBM to report a slightly greater risk purportedly associated with induced abortions.

The district court issued an opinion on August 16, 1996, holding for the defendants on all counts. The court reasoned that public transit stations do not constitute traditional public fora and that SEPTA and TDI had not created a public forum because they maintained control over the use of the advertising space. The court also found that Dr. Lee's letter was a "reasonable" basis on which to remove the advertisement. The court commented that "ultimately a consensus may develop" as to the link between breast cancer and abortion but "at this time we do not know." The court did not decide whether either SEPTA's or CBM's experts were "right."

CBM timely appealed to this Court. We have jurisdiction under 28 U.S.C. § 1291.

## II. Standard of Review

In evaluating the claim that CBM's First Amendment rights have been violated, we have a "constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay Group of Boston*, 115 S.Ct. 2338, 2344 (1995). This independent duty does not extend to the district court's rulings on matters of credibility, to which we continue to defer, *id.* (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)), but it does require us draw our own inferences from the factual

evidence presented. *United States v. Antar*, 38 F.3d 1348, 1357 (3d Cir. 1994); *Swineford v. Snyder Co. Pa.*, 15 F.3d 1258, 1165 (3d Cir. 1994).

**III. State Action and Commercial Speech**

Turning to the substantive issues, we readily dispose of two initial matters. First, the United States Constitution guarantees freedom of expression only against infringement by the state, not by private actors. *Hurley v. Irish-American Gay Group of Boston*, 115 S.Ct. 2338, 2344 (1995). In this case, however, the parties agree that SEPTA is a state actor, as is its licensee, TDI, and that their actions are constrained by the First and Fourteenth Amendments.

Second, the posters come within the ambit of speech fully protected by the First Amendment. The defendants argue that because callers to the 1-800 number listed on the poster may receive information advertising the services of medical malpractice attorneys, CBM's message is thereby transformed into "commercial speech," and should receive substantially less constitutional protection. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). But the speech at issue does not advertise goods or services, nor does it refer to a specific product or service. The 1-800 number listed on the poster does not even connect callers to CBM. Any economic motive of CBM for posting the advertisement is very attenuated at best. *See U.S. Healthcare v. Blue Cross of Gr. Philadelphia*, 898 F.2d 914, 932-933 (3d Cir. 1990). The speech involved is accordingly not "commercial," at least in the sense that it is afforded less protection under the First Amendment.

**IV. Public Forum**

The government may, as a general rule, limit speech that takes place on its own property without running afoul of the First Amendment. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390 (1993); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Where, however, the property in question is either a traditional public forum or a forum designated as public by the government, the government's ability to limit speech is impinged upon by the First Amendment. *Perry*, 460 U.S. at 45-46. In either a traditional or a designated

public forum, the government's content-based restrictions on private speech must survive strict scrutiny to pass constitutional muster. *Id.*; *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). The government has, however, a far broader license to curtail speech if the forum has not been opened to the type of expression in question. In such a case, the government's restrictions need only be viewpoint neutral and "reasonable in light of the purpose served by the forum." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S.Ct. 2510, 2516-2517 (1995) (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1262 (3d Cir. 1992).

In order to decide whether a public forum is involved here, we must first determine the nature of the property and the extent of its use for speech. The Supreme Court wrestled with a similar question in *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), when it considered whether legal defense funds could be excluded from a charity drive among federal employees. The government argued in *Cornelius* that the "federal workplace" was the relevant forum. The plaintiffs on the other hand maintained that the forum consisted only of the charity drive itself. *Id.* at 800. The Court defined the forum in terms of the access sought by the plaintiff. It accordingly rejected the view that the entire workplace was the proper forum, because the plaintiffs sought only to join the charity drive, not to engage in actual, face-to-face solicitation in the workplace. *Id.* at 801. The Court went on to conclude that the charity drive itself did not constitute a public forum and that the restrictions on participation were reasonable.

In this case, the district court variously defined the forum at issue as "the stations in a public transit system," a "public transportation system," and "SEPTA's subway and rail stations and their advertising space." Applying the reasoning of *Cornelius*, we look to the access sought by CBM. CBM did not seek to leaflet, demonstrate, or solicit in the rail and subway stations as a whole. Instead, it sought access only to the advertising space leased out by SEPTA, through TDI. The contract between the parties

next to the clocks at Suburban Station in Philadelphia. We conclude, therefore, that the forum at issue is SEPTA's advertising space in the stations and advertising space. *See, Airline Pilots Assoc. v. Dept. of Aviation of the City of Chicago*, 45 F.3d 1144, 1151 (7th Cir. 1995) (holding that display diorama in airport, not entire concourse, constituted relevant forum); *Lebron v. Nat'l. R.R. Passenger Corp.*, 69 F.3d 650, 655-656 (holding that one billboard was the relevant forum, not the entire Penn Station); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (holding that because MTA allowed both commercial and political speech, the outside of MTA buses is a designated public forum).[2]

Our next step is to decide whether SEPTA's advertising space is a public forum. It clearly does not constitute a "traditional" public forum, archetypal examples of which include streets and parks. These areas have been "held in the public trust," *Lee*, 505 U.S. at 680, and dedicated to expressive activity for "time out of mind." *Id.* (quoting *Hauge Committee for Industrial Organization*, 307 U.S. 496, 515 (1939)). We agree with the district court that the advertising space in the stations is not a traditional public forum. We do not understand CBM to argue otherwise.

More difficult is the question whether SEPTA has created a designated public forum by "expressly" dedicating its advertising space to "speech activity." *U.S. v. Kokinda*, 497 U.S. 720, 726-727 (1990) (plurality opinion). A designated

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2. The parties have not argued that the relevant forum is actually just advertising space in the stations, to the exclusion of space leased on and inside SEPTA vehicles. Because SEPTA stated that it used different standards in evaluating advertisements that appeared as wrap-around bus ads, one could conclude that these types of ads are a separate forum. *See Lebron*, 69 F.3d at 655 (one billboard, not all of the billboards in Penn Station, constituted the relevant forum because the billboard was unique and the speaker sought access only to that specific billboard), *but see Lebron*, 69 F.3d at 661 (Newman, C.J. dissenting) (arguing that "public forum analysis cannot be so particularized as to focus on one of several billboards on government property"). Whether we consider the limitations on wrap-around bus ads as creating a separate forum, or merely a particular limitation within the larger forum of SEPTA's advertising space, our disposition of the case remains the same.

public forum is created because the government so intends. Inaction does not make such a forum; neither does the allowance of "limited discourse." *Cornelius*, 473 U.S. at 802. We accordingly look to the authority's intent with regard to the forum in question and ask whether SEPTA clearly and deliberately opened its advertising space to the public. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 269-270 (1988); *Perry*, 460 U.S. at 37. To gauge SEPTA's intent, we examine its policies and practices in using the space and also the nature of the property and its compatibility with expressive activity. *Gregoire v. Centennial School District*, 907 F.2d 1366, 1371 (3d Cir. 1990) (*citing Cornelius*, 473 U.S. at 802); *Brody v. Sugzdinis*, 957 F.2d 1108, 1117 (3d Cir. 1992). Restrictions on the use of the forum, however, do not necessarily mean that SEPTA has not created a public forum. They may demonstrate instead that SEPTA intended to create a limited public forum, open only to certain kinds of expression. *See, e.g., Kreimer*, 958 F.2d at 1261 (public library constituted a limited public forum for "reading, writing and quiet contemplation," but not for "oral and interactive" First Amendment activities); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S.Ct. 2510, 2517 (1995) (student activities fund, available to student groups meeting certain criteria, constituted limited public forum).

A. SEPTA's policies

We will look first at the purpose for which SEPTA uses the space in question. The main function of the advertising space at issue is to earn a profit for SEPTA. Although SEPTA generates approximately 99.5% of its revenues through the operation of the public transit system, it does derive about one half of one percent of its operating budget from the leasing of advertising space in its stations and in and on its vehicles. The contract between TDI and SEPTA states that "it is understood that it is Licensee's obligations [sic] under the terms of this contract to produce revenues . . . ."[3]

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3. That the generation of income is a goal of the advertising space is also reflected in the manner in which SEPTA is paid by TDI under the

The record shows that TDI and SEPTA also had a secondary goal in using the space: promoting "awareness" of social issues and "providing a catalyst for change." These objectives are stated in the "TDI Cares" brochure. The "TDI Cares" program, in which SEPTA participates, seeks to "'give back' to the communities which [TDI] serve[s] in many ways . . .." In this program TDI picks an issue of public concern and then pays for the materials and labor involved in creating the advertisements. The purpose of the program, in TDI's words, is to assail TDI markets with "images, both poignant and creative, which are designed to elevate awareness and provide a catalyst for change." This page of the brochure is headed "consciousness" and states that the program tries to "focus consciousness on an issue of pressing human concern." The testimony at trial was that SEPTA participated in TDI's annual campaign by donating unsold advertising space. SEPTA and TDI "jointly agree" on what initiatives will run in the Philadelphia area, but it is not clear from the record which ads ran on SEPTA property under this program.[4]

SEPTA argues that where the government runs a commercial operation, a "bright-line rule" directs that no public forum has been created. For this proposition, SEPTA

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contract. TDI guarantees a minimum annual payment to SEPTA, one twelfth of which is due at the beginning of each month, but SEPTA receives fifty-five percent of all net sales in any given month if that amount is greater than one twelfth of the guaranteed annual payment. In the first agreement year, the guaranteed annual payment was $2,000,000. This rose to $2,950,000 for the fifth and final agreement year.

4. SEPTA contends that we should not consider the TDI Cares brochure because it is hearsay. The brochure was, however, admitted into evidence without objection by SEPTA. Moreover, it was offered not for the truth of the matter asserted but for the fact that the assertions were made — which is not hearsay. In addition, the brochure plays little role in our decision. There is no evidence on the record of which ads actually ran in the campaigns described in the brochure or of how much advertising space SEPTA and/or TDI actually donated to those campaigns. Considered with the other evidence in the record, the brochure demonstrates, however, that the forum in question is suitable for speech concerning social problems and issues.

cites *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). In *Lee*, the Court considered restrictions on solicitation and leafleting in airport terminals. The Court began by noting that the government owned and operated the airport terminals and that:

> Where the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its actions will not be subjected to the heightened review to which its actions as a lawmaker may be subject.

505 U.S. at 678 (quoting *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) (citing *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 866, 896 (1961))).

In *Lee*, the Court went on, however, to apply the factors identified in *Cornelius* to determine whether the airport terminals were public fora. The Court reasoned that the city's purpose in operating the airport was to generate a profit by serving the air-traveling public. The goal of the terminal was "the facilitation of passenger air travel" and not "the promotion of expression." 505 U.S. at 682. The Court distinguished the restricted access in air terminals from other "transportation nodes," such as rail and bus stations. *Id.* at 681.

We do not read *Lee*, as SEPTA suggests, to mean that every time the government runs a commercial enterprise it has, by definition, decided not to create an open forum. To the contrary, it is the commercial and restricted nature of an airport concourse which suggested that the government did not intend the concourse to be primarily a forum for expression. *See also Cornelius*, 473 U.S. at 799-800.

Here, we have determined that the forum is not the SEPTA stations, but only the advertising space within the stations. We need not concern ourselves with solicitation or leafletting of the public within the stations but only with the use of the ad space itself. The nature of this forum is partly commercial, consistent with the goal of SEPTA to earn a profit on its advertising space and with CBM's offer to pay the commercial rate to lease that space. *See Airline Pilots Assoc. v. Dept. of Aviation of the City of Chicago*, 45 F.3d 1144, 1157 (7th Cir. 1995); *Stewart v. District of*

*Columbia Armory Bd.*, 863 F.2d 1013, 1019 (D.C. Cir. 1988). However, SEPTA has also used the advertising space to generate a profit through *expressive* activity. This expressive use has not interfered with providing rail transportation facilities to the public. Thus, the nature of the forum suggests, but by no means establishes, *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), that the government has dedicated the space to expression in the form of paid advertisements. *See Southeastern Promotions, Limited v. Conrad*, 420 U.S. 546, 555 (1975) (holding municipal theaters were "public forums designed for and dedicated to expressive activities").

With these goals in mind, we next consider SEPTA's written policy governing permissible advertising. The contract between TDI and SEPTA provides that "it is SEPTA's strong preference that [TDI] concentrate on securing advertising other than that which is tobacco and alcohol related." The contract directs that TDI use its "best efforts" to fill the space with other advertisements. Recognizing that TDI's responsibility under the contract is to "produce revenues," the contract permits the combined sale of alcohol and tobacco advertising of up to twenty percent of the annual dollar value of the advertising. TDI also, however, has an obligation to "pursue qualified public health groups, as identified by SEPTA" and to make advertising space available to them "on a one to one ratio to the tobacco and alcohol related advertising at that time, subject to space availability." In addition, the contract reserves for SEPTA the right to reject advertisements that it does not like:

> All advertising displays at any time inserted or placed by the Licensee in any display devices in any vehicle and /or locations shall be of an appropriate character and quality, and the appearance of all displays shall be acceptable to SEPTA. No libelous, slanderous, or obscene advertising maybe accepted by the Licensee for display in the Authority's transit and railroad vehicles and facilities. All advertising determined by the [sic] SEPTA, in its sole discretion, as objectionable within the meaning of this subsection must not be utilized on any SEPTA vehicle or facility. SEPTA shall have the

> right to immediately remove any advertising material which has already been applied, in the event that the [sic] SEPTA deems material objectionable for any reason, at the expense of the Licensee.

SEPTA argues that because it retained the right in its sole discretion to reject or to remove any advertisement that it deems objectionable, it did not create a public forum of any sort. The authority's own statement of its intent, however, does not resolve the public forum question. *Gregoire v. Centennial School District*, 907 F.2d 1366, 1374 (3d Cir. 1990) (reasoning that "intent, as evidenced by a government's statements, is a factor to be considered," but that "the forum inquiry does not end with the government's statement of intent"); *see also Air Line Pilots Association, Int'l. v. Dept. of Aviation*, 45 F.3d 1144, 1153-1154 (7th Cir. 1995); *Stewart v. Dist. of Columbia Armory Bd.*, 863 F.2d 1013, 1016-1017, 1020 (D.C.Cir. 1988).

Furthermore, the fact that SEPTA has reserved for itself the right to reject ads *for any reason at all* does not signify, in and of itself alone, that no public forum has been created. *See Gregoire*, 907 F.2d at 1375. In *Gregoire*, we warned that "standards for inclusion and exclusion" in a limited public forum "must be unambiguous and definite" if the "concept of a designated open forum is to retain any vitality whatever." 907 F. 2d at 1375. We do not hold that the government could never, pursuant to an open-ended policy of excluding speech as it sees fit, effectively close the forum to certain speech (or maintain an entirely closed forum) through a consistent practice of so doing. But the fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum. If anything, we must scrutinize more closely the speech that the government bans under such a protean standard. *See Gregoire*, 907 F.2d at 1375; *id.* at 1386 (Stapleton, J., dissenting); *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S.Ct. 2374, 2414-2415 (1996) (Kennedy, J., concurring in part and dissenting in part); *Lebron*, 69 F.3d at 661-662 (Newman, C.J., dissenting).

SEPTA's purpose in operating the forum and its written policies governing access provide no conclusive answer as to whether the forum is intended to be closed or open. The goal of generating income by leasing ad space suggests that the forum may be open to those who pay the requisite fee. SEPTA has specified a few areas in which it will not freely accept advertising: alcohol and tobacco advertising beyond a specified limit and ads deemed libelous or obscene. These restrictions do not apply to the CBM posters. Beyond these limitations, there are no specific restrictions on the type of advertising that SEPTA will accept. In effect, SEPTA's reservation of the right to reject any ad for any reason does not conclusively show that it intended to keep the forum closed.

We turn now to SEPTA's past practice in using the advertising space, and the suitability of the forum to the speech in question.

B. SEPTA's Past Practice and the Suitability of the Forum for CBM's Ad

SEPTA has accepted a broad range of advertisements for display. These include religious messages, such as "Follow this bus to FREEDOM, Christian Bible Fellowship Church;" an ad criticizing a political candidate; and explicitly worded advertisements such as "Safe Sex Isn't" and an advertisement reminding viewers that "Virginity-It's cool to keep" and "Don't give it up to shut 'em up." Indeed, many ads address topics concerning sex, family planning, and related topics. Other examples include a controversial ad campaign on AIDS education and awareness, posters stating "The Face of Adoption" "Consider Adoption" and "Every child deserves a family," and another ad reading "Pregnant? Scared? Confused? A.R.C. Can Help Call 1-800-884-4004 or (215-844-1082.)"

On the topic of abortion, SEPTA has accepted two ads. One read "Choice Hotline, For Answers to Your Questions About: Birth Control • Pregnancy • Prenatal Care • Abortion • Adoption • HIV/AIDS • Sexually Transmitted Diseases (STDs) Abortion – Making A Decision, Call State Health Line 1-800-692-7254 For Free Booklet on Fetal Development,

Fetus is Latin for Little one - A Little Human is a Baby, Confidential • Free." The other one addressed the health benefits of legalizing abortion: "When Abortion Was Illegal, Women Died. My Mother Was One of Them. Keep Abortion Legal and Safe. Support the Clara Bell Duvall Education Fund. 471-9110."

From the broad range of ads submitted, SEPTA has requested modification of only three. One was the large wrap-around bus ad for Haynes hosiery, which would have covered the entire bus with the picture of a "scantily clad" woman; it was too "risque." The same ad was accepted as a smaller "poster" ad on the sides of buses. SEPTA also asked for modification of an ad depicting a gun with a condom stretched over it. The text of the ad, "Safe Sex Isn't," ultimately ran without the graphics. SEPTA also requested that an advertisement for a personal injury law firm delete references to rail accidents.

We conclude then, based on SEPTA's written policies, which specifically provide for the exclusion of only a very narrow category of ads, based on SEPTA's goals of generating revenues through the sale of ad space, and based on SEPTA's practice of permitting virtually unlimited access to the forum, that SEPTA created a designated public forum. Moreover, it created a forum that is suitable for the speech in question, *i.e.*, posters which presented messages concerning abortion and health issues. CBM paid for advertising space which had previously been used for ads on those topics. We need not define the precise boundaries of the forum, particularly concerning visual images that could be considered explicit. The topic of abortion and its health effects were, however, "encompassed within the purpose of the forum." *Cornelius*, 473 U.S. at 806.

SEPTA argues, however, and the district court concluded, that the instances in which SEPTA requested modification of ads demonstrate that SEPTA maintained "tight control" over the forum. This reasoning is consistent with a number of cases, holding that generally when permission is necessary before ads are posted, the government has not created a public forum. *See Perry*, 460 U.S. at 47. In this case, however, at least 99% of all ads are posted without

objection by SEPTA. As we note above, SEPTA has exercised control over only three ads, two of which had graphics to which SEPTA objected, and one of which solicited personal injury cases that could be directed against SEPTA. In one case, the concern with the graphics was unique to the wrap-around type bus ad — concerns not implicated here. In all three cases, after negotiation with the sponsor, the ads were permitted to run with some modification.

Because of SEPTA's policy in accepting ads, including two on the specific topic in question, the argument that SEPTA has "tight control" over the forum may apply to ads which are similar to the ones for which SEPTA has required modification. That does not mean, however, that such control applies to subject matter over which SEPTA has never before exercised any restrictions. Because the forum may be limited in one way does not foreclose its status as a public forum with respect to other categories of speech. If it did, there would have been no limited public forum in *Widmar*, 454 U.S. at 267, or in *Rosenberger*, 115 S.Ct. at 2510. Both cases involved designated fora which excluded non-student groups. Nor would there have been a limited public forum in *Kreimer*, where the library constituted a public forum although it was open only to certain kinds expression.[5]

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5. In *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S.Ct. 2374, 2388 (1996) (plurality opinion), the Court was troubled by how to characterize the government's decision to limit a forum to exclude certain speech. Does strict scrutiny apply, Justice Breyer asked for the plurality, if the government "builds a band shell in the park and dedicates it solely to classical music (but not to jazz)?" Justice Kennedy responded that the correct analogy to the cable system at issue was "the Government's creation of a band shell in which all types of music might be performed except rap music," and went on to say that "the provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes, or otherwise wishes to exclude on account of its effects, and there is no justification for anything by strict scrutiny here." 116 S.Ct. at 2374 (Justice Kennedy, concurring and dissenting). In this case, the past practice of permitting much speech, particularly that on the topic of abortion, makes Justice Kennedy's analogy apt.

But we reiterate that the government's exercise of some restrictions on speech does not foreclose a public forum. We do not hold that merely because the government may have had a past practice of permitting some expressive activity, it has created a public forum. Standing alone, a past practice of permitting some expressive activities or "limited discourse" does not mandate that the government intended the forum as public. *Cornelius*, 473 U.S. at 802; *Kokinda*, 497 U.S. at 720; *Perry*, 460 U.S. at 47.[6] We must look at the past practice in conjunction with the purpose of the forum. In *Cornelius*, although the government permitted speech in the forum, the "extensive" criteria for admission to the forum and the government's purpose in creating the forum demonstrated that the government intended the forum to be closed. 473 U.S. at 804-805; *see also, Kokinda*, 497 U.S. at 730; *Perry*, 460 U.S. at 47-48. Here, on the other hand, the purpose of the forum does not suggest that it is closed, and the breadth of permitted speech points in the opposite direction.

Moreover, there is no evidence that SEPTA rejected the ad pursuant to a new or previously existing policy to close the forum to debatable or misleading speech generally, or

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Our consideration of the similarity of the speech in question to speech permitted in the past is related to a determination of whether the limitation constitutes viewpoint discrimination, although here we make that inquiry only in conjunction with the other factors in the public forum analysis. We do not reach the viewpoint discrimination issue in this case. Even if we concluded that no viewpoint discrimination took place, however, this would not make the past use of the space irrelevant in determining whether the forum is public. How the forum has been used in the past is a core component of the public forum inquiry. *See, e.g., Cornelius* at 803-805; *see also Denver Area Consortium*, 116 S.Ct. at 2415 (Kennedy, J. concurring and dissenting) ("It contravenes the First Amendment to give Government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.").

6. In *Kokinda*, only four Justices concluded that no public forum had been created. Four Justices reached exactly the opposite exclusion — a limited public forum had been created — based in large part on the past practice of permitting speech in the forum. *Kokinda*, 497 U.S. at 750.

closed it to such speech on any particular topic of health. To the contrary, SEPTA simply argues that the forum was closed, and will be closed, to any speech that SEPTA wishes to exclude for any reason. In other words, SEPTA does not argue that the forum is closed to this particular type of speech because SEPTA views it differently from the speech it has permitted in the past. Instead, SEPTA claims the forum is closed to all speech, and that short of viewpoint discrimination, SEPTA can make any content-based restrictions it chooses. SEPTA's prior acceptance of a broad range of advertisements cuts particularly strongly against this claim. *Cf. Greyoire*, 907 F.2d at 1373. As Justice Kennedy reasoned in *Denver Area Consortium*, "[t]he power to limit or redefine forums for a legitimate purpose [citation omitted] does not allow the government to exclude certain speech or speakers from them for any reason at all." 116 S.Ct. at 2414 (Kennedy, J.) (concurring and dissenting).

The Seventh Circuit has also concluded, in a case similar to this one, that a transportation authority created a limited public forum. *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985). In *Planned Parenthood*, the Chicago Transit Authority ("CTA") refused to lease advertising space to Planned Parenthood for display of "abortion-related" advertisements. Although CTA had rejected an anti-Vietnam war ad (later displayed as part of a settlement agreement), and an "Impeach Nixon" placard (later displayed pursuant to court order), CTA had accepted an anti-war ad depicting "large bombs falling on a child releasing a dove with an olive branch in its beak." 767 F.2d at 1230. The court concluded that CTA had created a limited public forum, reasoning that "CTA maintains no system of control over the advertisements that it accepts ... other than the general contractual directive .... to refuse vulgar, immoral, or disreputable advertising" and that CTA "has allowed its advertising space to be used for a wide variety of commercial, public-service, public-issue, and political ads." *Id.* at 1232-1233. Noting as well that CTA had no policy pursuant to which the ad was excluded, the court concluded that the transportation authority had created a public forum. We are confronted with a similar factual situation in this case, and we reach the same conclusion.

In arguing to the contrary, SEPTA relies primarily on *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788,902 (1985) and *Student Coalition for Peace v. Lower Merion School*, 776 F.2d 431, 436 (3d Cir. 1985). In *Cornelius*, however, the government had a "consistent policy," spanning more than two decades, of limiting the charity drive to organizations that provided "direct health and welfare services to individuals . . . ."[7] 473 U.S. at 793. The purpose of the charity drive, moreover, was to limit the disruptive effects of individual charity drives throughout the year, by "lessening the amount of expressive activity occurring on public property." *Id.* at 805. Here, there is no comparable "policy and practice" demonstrating that the government intended that the forum be closed to the speech at issue in this case. Indeed, the record points exactly the other way. In its efforts to generate advertising revenues, SEPTA permitted abortion-related and other controversial advertisements concerning sexuality.

In *Student Coalition for Peace v. Lower Merion School*, 776 F.2d 431, 436 (3d Cir. 1985), we considered the refusal of a school board to permit a "Peace Fair" on the school's athletic field or inside the boys' gymnasium. A student organization, not sponsored by the school, which advocated a bilateral nuclear freeze, sought to conduct the fair at the school. The school had permitted use of the athletic field for a Special Olympics, for a Memorial Day service, for a "Bike Hike," and for jogging, picnics, and similar activities. 776 F.2d at 434. The board rejected the request pursuant to an unwritten, but long-standing policy of reserving the athletic field for "athletic and governmental purposes." The board noted that use of the gym could cause damage to the floor, and offered the use of the auditorium, which the group

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7. This policy was in effect from 1963 until 1982. *Cornelius*, 473 U.S. at 792. During 1982 and 1983, some legal defense funds participated in the charity drive under court order. An Executive Order issued in 1983 limited participation to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families," excluding "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." 473 U.S. at 795.

rejected. We concluded, because permission to use the facilities in question was not granted "as a matter of course" and because the nature of the property suggested the facilities did not have as their primary purpose expressive activities, that the government had not created a limited public forum. *Id.* at 436-437. The property at issue here, on the other hand, has been dedicated to expressive activity of exactly the sort in which petitioners seek to engage. Moreover, as to the subject of abortion specifically, and family planning issues generally, permission to post advertisements has been granted as a "matter of course." There is no policy, written or unwritten, pursuant to which CBM's ads were removed.

*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) is similarly inapposite. In *Lehman*, the Court considered a ban on political advertising in the city's transit vehicles. A candidate for city council challenged the city's rejection of his ad pursuant to the city's policy, which had been in effect for 25 years. The card space, the Court reasoned, was a "commercial venture," and the city was free to limit the space to enhance commercial revenues, and to protect riders from the "blare of political propaganda." *Id.* at 303-304. As we have made clear, however, SEPTA has no long-standing practice of prohibiting ads like CBM's; nor does it have any policy pursuant to which the ads were removed. SEPTA's past practice is, instead, to include such ads.

Because we find that SEPTA has created a designated public forum, content-based restrictions on speech that come within the forum must pass strict scrutiny to comport with the First Amendment. *Perry*, 460 U.S. at 46. As the Supreme Court explained in *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. at 92, 95, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Thus the government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities." *Id.* at 96. The prohibited expression in this case, CBM's ad, falls within the scope of the forum created by

SEPTA. Thus, SEPTA's restriction is subject to heightened review.

SEPTA has not argued that its actions survive strict scrutiny. Accordingly, we conclude that CBM's First Amendment rights were violated when SEPTA removed CBM's ads.

## V. Reasonableness of SEPTA's Restrictions

Even if the speech in question had fallen outside the limited public forum created by SEPTA, we would nonetheless conclude that SEPTA's removal of the posters violated the First Amendment because the removal was not "reasonable." When reviewing a governmental agency's limitation of speech on government property that has not been designated a public forum, the "reasonableness" of action limiting speech is gauged with reference to the nature of the forum itself. As the Supreme Court explained:

> Consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.

*United States v. Kokinda*, 497 U.S. 720, 732 (1990) (plurality opinion) (quoting *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *see also*, *Perry*, 460 U.S. at 49. The *Kokinda* plurality went on to hold that a ban on solicitation on postal premises was reasonable, in part because the "purpose of the forum" was "to accomplish the most efficient and effective postal delivery system." *Id.* at 732. Solicitation, the postal service had decided, was "inherently disruptive" of its business. *Id.*

Other cases also make clear that the reasonableness of the government's restriction on speech depends on the nature and purpose of the property from which it is barred. In *Kreimer*, for example, we considered whether regulations governing the behavior of library patrons were reasonable by evaluating to what extent the regulations were consistent with, or promoted, the purposes to which the library had been dedicated. 958 F.2d at 1262. Rules limiting disruptive behavior were deemed reasonable

because they constituted "perhaps the clearest and most direct way to achieve maximum library use." *Id*; *see also*, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 270, 273 (1988) (content-based restrictions on speech in school newspaper constitutional "so long as [they] are reasonably related to legitimate pedagogical concerns"); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (distinctions in non-public forum based on "subject matter and speaker identity" are constitutional as long they are "reasonable in light of purpose served by the forum and are viewpoint neutral"); *Lee v. Intern. Soc. for Krishna Consciousness, Inc.*, 505 U.S. 672, 685 (1992) (O'Connor, J., concurring) (reasonableness inquiry is "whether [the restrictions on solicitation and on distribution of literature] are reasonably related to maintaining the multipurpose environment that the Port Authority has created.").

Similarly, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974), the Court considered whether the city's refusal to accept political advertising on its rapid transit vehicles violated the First Amendment. The Court reasoned that

> Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about political favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial system to limit car card space to innocuous and less controversial advertising does not rise to the dignity of a First Amendment violation.

418 U.S. at 304 (plurality opinion). The Court thus reasoned that, in order to maximize commercial revenue and eliminate concerns about political favoritism, the city could restrict the car card space to exclude political advertisement.

In this case, the district court concluded that SEPTA acted reasonably in relying on Dr. Lee's letter to remove the

CBM posters. However, CBM paid the commercial rate for the advertising space, just like any other advertiser, and submitted an advertisement on abortion and women's health, topics that were already the subject of other permitted advertisements. The subject of the speech, and the manner in which it was presented, were compatible with the purposes of the forum.

The plurality opinion in *Kokinda* warned against accepting the argument that simply because the government permitted other potentially disruptive speech on postal property, it had to permit solicitation as well. The Court reasoned that "whether or not the Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business." 497 U.S. at 733.[8] *See also Greer v. Spock*, 424 U.S. 831, 838 n.10 (1976). In this case, however, unlike *Kokinda* and *Lehman*, the government has offered no basis on which to conclude that the speech in question would interfere with the accepted purposes of the advertising space. *See Lee v. Intern. Soc. for Krishna Consciousness, Inc.*, 505 U.S. 672, 691 (1992) (O'Connor, J. concurring) ("because I cannot see how peaceful pamphletting is incompatible with the multipurpose environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction 'preserves the property' for the several uses to which it has been put. [citation to *Perry*]"); *Airline Pilots Assoc. v. Dept. of Aviation*, 45 F.3d 1144, 1161 (7th Cir. 1995) (Flaum, J. Concurring) ("...when the government decides who may speak based on substantive criteria, it acts as a censor. The government should not normally take on the role of deciding who may speak on what matters, regardless of what capacity in which it acts").

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8. Although the four Justice plurality concluded that the restriction was reasonable, three dissenting Justices concluded that even if the forum was nonpublic, the restrictions were not reasonable, in large part because the post office permitted other disruptive speech. This "inconsistent treatment," in the eyes of the dissent, "renders the prohibition on solicitation unreasonable." *Kokinda*, 497 U.S. 760-761 (Brennan, J. dissenting).

SEPTA argued before the district court that Gambaccini had testified that SEPTA "closed the debate to a situation in which there are ads or debated and dubious statements of medical fact."[9] Consistent with this statement, SEPTA could have argued that based on Dr. Lee's letter, it viewed CBM's ad as "debated and dubious," and accordingly excluded it. A prohibition on "debated and dubious ads," put in place before, or because of the concerns about CBM's ad, might qualify as reasonable. We note, however, that SEPTA does not have a policy of protecting riders from "debated and dubious" speech generally, nor does SEPTA link this purported policy to its use of the forum.

In any event, we need not reach that question. Gambaccini did not testify to such a policy, implemented either before or after the removal of CBM's ad. Instead, when questioned if he would post an ad saying "women who choose abortion live longer and have less breast cancer," he answered "[N]ot unless there was some credible evidence to support it." (Appendix at 354-355). This is a different standard — a debatable advertisement may well be supported by credible evidence. And if this standard controlled, SEPTA was unreasonable because it failed to give CBM an opportunity to produce such evidence. Moreover, Gambaccini did not explain whether this standard applied generally, or just to ads on the topic of abortion and cancer. Nor did he explain SEPTA's grounds for adopting it. SEPTA has left us to guess why, in terms of the purpose of the forum, it excluded CBM's ad, and why, and to what extent, other ads will also be excluded. This makes it difficult to evaluate the extent of the governmental interest in excluding the speech from SEPTA's property.

Finally, as we have noted, SEPTA never asked CBM — the sponsor of the ad — to defend its accuracy, to explain the basis for the ad, or to clarify it. Instead, SEPTA removed the ad without contacting CBM — even though CBM had modified the poster in response to SEPTA's previous requests.

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9. SEPTA argued before us that it "determined not to devote its advertising areas to alarming allegations regarding cancer and abortion, given the controverted nature of the public health claim as described in the HHS letter."

We conclude, therefore, that under the facts presented SEPTA's actions were not reasonable. SEPTA acted as a censor, limiting speech because it found it to be "misleading." SEPTA argues that it cannot investigate the accuracy of medical claims in ads. For that reason, it relied on Dr. Lee's letter. We do not hold that SEPTA must hire its own cadre of experts to evaluate medical claims made in ads. It was SEPTA, however, which accepted advertising on a permitted topic, and then decided that CBM's ad was unacceptably misleading. Having decided to exclude the posters on this basis, SEPTA did not act reasonably when it failed to ask CBM to clarify the basis on which the claim was made. This is all the more true where SEPTA has failed to explain how its content-based distinctions are related to preserving the advertising space for its intended use, and where SEPTA has in place no policy, old or new, written or unwritten, governing the display of ads making contested claims.

## VI. Conclusion

For the reasons set forth above, we will reverse district court's order granting judgment to SEPTA, and we will remand this case for further proceedings consistent with this opinion.

A True Copy:–
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|---|
| CHRIST'S BRIDE MINISTRIES, INC. | : | CIVIL ACTION |
| v. | : | |
| SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, et al. | : | NO. 96-3631 |

**MEMORANDUM**

Bartle, J. August 16, 1996

This is a case about posters, in the Philadelphia subway and commuter rail stations, which carried the message, "WOMEN WHO CHOOSE ABORTION SUFFER MORE AND DEADLIER BREAST CANCER."

I

Plaintiff Christ's Bride Ministries, Inc. ("CBM") has sued the Southeastern Pennsylvania Transportation Authority ("SEPTA"), the owner and operator of the commuter subway, bus and rail systems in the Philadelphia metropolitan area, and its licensee Transportation Displays, Inc. ("TDI") for removing CBM's previously installed antiabortion posters. CBM claims, pursuant to 42 U.S.C. § 1983, that defendants violated its right of free speech under the First and Fourteenth Amendments to the Constitution, and its right to equal protection under the Fourteenth Amendment. CBM also has a contract claim. Among other relief, CBM seeks a permanent injunction to compel the reinstallation of its signs. The court held a non-jury trial on the merits. It now renders its findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

CBM is a small non-profit religious, educational, and charitable organization incorporated in Virginia. It has been engaged in a campaign over the last year and one-half to acquaint women in particular and the public generally with what it believes to be the health risks attendant to an abortion. As part of this effort, it has sought to post its message in the subway and commuter rail stations in various cities, including Baltimore, Philadelphia, and Washington.

In December, 1995 Bradley Thomas, the president of CBM, contacted SEPTA about the placement of antiabortion advertisements in SEPTA's subway and rail stations. Thomas was directed to TDI, which has a contract with SEPTA to solicit, oversee, and manage the placement of advertisements in and on SEPTA's buses, subways, trains and facilities. Under that contract TDI was prohibited from displaying "any libelous, slanderous, or obscene" material. SEPTA retained the right to approve in advance all advertising and to remove any advertisement it found to be objectionable for any reason.

After numerous phone conversations and discussions, TDI and SEPTA ultimately approved the copy for CBM's posters. They read, as noted above, "Women who choose abortion suffer more and deadlier breast cancer." The signs were graphically designed with bold white lettering on a background of black and bright red, except that the word "deadlier" was written in red. The posters also contained the following in small print: "Information: 1-800-634-2224," as well as CBM's name as the sponsoring organization. The 800 number did not connect to CBM. Instead, it belonged to an organization known as the American Rights Coalition ("ARC") located in Chattanooga, Tennessee. ARC would send callers various pamphlets explaining what it believed to be the linkage between abortion and breast cancer.

The written contract between TDI and CBM, which was for one year, was dated January 22, 1996. The contract included the amount CBM agreed to pay for the poster display and the number of posters to be installed. It also provided that if SEPTA "should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice."

On January 15, 1996, a week before the contract was dated, TDI placed two CBM signs in prominent locations by overhead clocks in Philadelphia's Suburban Station. Additional signs were located in 25 of the subway and commuter rail stations in Philadelphia and the surrounding suburbs.

Shortly after their installation, SEPTA and TDI required CBM to identify itself more prominently on the advertise-

ments. CBM complied. It supplied "snipes" or large decals which TDI affixed to the posters. They contained the following language:

> Christ's Bride, Ministries, Inc. (CBM) is a charitable, religious, educational, non-profit 501(c)(3) organization incorporated in Virginia. CBM, P.O. Box 22 Merrifield, VA 22116♦(703) 598-2226

In early February, 1996, several weeks after the advertisements were displayed, SEPTA received a copy of a letter written by Dr. Philip Lee, Assistant Secretary of Health in the United States Department of Health and Human Services. The addressee of the letter was Mr. Lawrence Reuter, General Manager of the Washington Metropolitan Area Transit Authority, where CBM's signs had also appeared. In his correspondence, Dr. Lee asserted, "This ad is unfortunately misleading, unduly alarming, and does not accurately reflect the weight of the scientific literature." He added, "We strongly object to the ad because it appears to be based on studies that are inconclusive, biased, and poorly designed." He urged the Washington Metro system to withdraw the advertisements. Relying primarily on Dr. Lee's letter, SEPTA's General Manager, Louis Gambaccini, exercised SEPTA's contractual right and directed TDI to remove the CBM posters. TDI did so on February 16, 1996. Prior to their removal, SEPTA never made any independent study or determination as to the accuracy of CBM's message, that is, whether or not women who have an abortion will in fact "suffer more and deadlier breast cancer."

CBM had spent over $3,300 for the printing of the posters and had paid SEPTA slightly over $6,000 for the display of the posters for two months. Since the advertisements had run for only one month, SEPTA returned to CBM $3,043, which represented half of its payment.

II

Because the parties have stipulated to consolidate the preliminary injunction hearing with a trial on the merits, the court proceeds under the standard for a permanent injunction. First, the plaintiff must demonstrate that the court's exercise of equity jurisdiction is proper. Second, the plaintiff must actu-

ally succeed on the merits of its claim. Third, the plaintiff must show that the balance of the equities tips in favor of injunctive relief. *Roe v. Operation Rescue,* 919 F-2d 857, 867 n.8 (3d Cir. 1990). We turn first to the merits of plaintiff's claim.

As a preliminary matter, it is undisputed that SEPTA and its agent TDI are state actors for purposes of this lawsuit, and therefore are subject to First and Fourteenth Amendment constraints. *See Lebron v. National Railroad Passenger Corporation,* __ U.S. __, 115 S. Ct. 961, 972 (1995). SEPTA, created in 1968 by Act of the General Assembly, operates pursuant to 74 Pa. Cons. Stat. Ann. § 1501 et seq.; *see Feingold v. SEPTA,* 517 A.2d 1270, 1275 (Pa. 1986). It "exercise[s] the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa. Cons. Stat. Ann. § 1502. Moreover, it cannot be gainsaid that the issue of abortion is one of the most spirited subjects of current public discourse. CBM's antiabortion message is a form of political speech protected by the First Amendment.[1] Consequently, we must determine if a state actor may prohibit such speech and if so under what circumstances.

It is well settled that the government's ownership of property does not automatically open that property to all speech. Rather, as the Supreme Court has stated:

> Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.

*Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. 788, 799-800 (1985).

To determine what limits the government may place on protected speech, the Supreme Court requires us to engage in an exercise known as forum analysis. *See Perry Education*

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1. Defendants argue strenuously that the plaintiff's message is commercial speech entitled to significantly lesser protection than political speech. We reject this argument as without merit.

*Association v. Perry Local Educator's Association,* 460 U.S. 37 (1983); *International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992). According to *Perry,* "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending upon the character of the property at issue." *Perry,* 460 U.S. at 44. The relevant forum in this case is SEPTA's subway and rail stations.

The Court in *Perry* recognized three types of fora: (1) the traditional public forum; (2) the public forum created by government designation; and (3) the nonpublic forum. Traditional public fora are those places "which by long tradition or by government fiat have been devoted to assembly and debate ...." *Id.* at 45. This category includes parks, public sidewalks, and meeting halls. The government is subject to strict scrutiny in any attempt to limit First Amendment activity in a traditional public forum. It may exclude speech from a public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius,* 473 U.S. at 800.

The second category, a designated public forum, consists of "public property which the state has opened for use by the public as a place for expressive activity." *Perry,* 460 U.S. at 45. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. *Cornelius,* 473 U.S. at 802. Although the government is not required to open or indefinitely retain the open nature of these places, the government is bound, once it does so, by the same limitations as exist in the traditional public forum context. If SEPTA has designated the subway and rail systems as public fora, then the antiabortion sign may not be excluded without the showing of a "compelling government interest." *Id.* at 800.

In contrast, a nonpublic forum, the third category, "is not by tradition or designation a forum for public communication ...." *Perry,* 460 U.S. at 46. The mere fact that government property is used for expressive activity does not qualify it as a public forum. Rather, "the State, no less than a private owner of property, has power to preserve the property under its con-

trol for the use to which it is lawfully dedicated." *Id.* If the subway and rail stations are nonpublic fora, the standard for review of any limitation on speech is not one of strict scrutiny. Rather; SEPTA may restrain speech "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806.

In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), a candidate for state office sought to advertise his candidacy on buses in the city transit system. While the city refused to permit political advertisements of any kind, it allowed commercial advertising as well as messages for public service groups. The Supreme Court held that advertising space on a city transit system was not a public forum for purposes of the First Amendment. Refusal to accept political advertising was not a violation of the Constitution.

In its forum analysis, the Court was influenced by the fact that the commuters used the transit system by necessity and were a captive audience. The plurality opinion added:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce .... The car card space, although incidental to the provision of public transportation, is part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, *a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.*

[emphasis added]. *Lehman,* 418 U.S. at 303.

More recently, in *International Society of Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992), the Supreme Court determined that the interior of an airport terminal operated by a public authority is a nonpublic forum for purposes of solicitation by a religious group. The Court cited with approval its decision in *Lehman.* It went on to explain:

> Where the government is acting as a proprietor, managing its internal operations, rather than acting as

> lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.

*Krishna*, 505 U.S. at 678.

The Court emphasized that a public forum is not created simply because it is a place where the public may freely come and go. In coming to its conclusion that the airport terminal was a nonpublic forum, the Court declared that transportation centers do not have and have not traditionally had as their purpose the "free exchange of ideas." *Krishna*, 505 U.S. at 682. It further noted that "sites such as bus and rail terminals traditionally have had *private* ownership," a factor negating any notion that they were designed to be treated as market places for debate on public issues. *Id.* at 681.

We think it is clear that stations in a public transit system do not constitute a traditional public forum. They are not parks, sidewalks, streets, or meeting halls. CBM, however, argues that by virtue of the extensive advertising it accepts, SEPTA has designated its subway and rail system as a public forum. Plaintiff contends that SEPTA exercises little control over who may advertise and the content of their messages. We reject this contention.

SEPTA presented ample evidence that it retains firm control over the types of advertising which may be displayed in its stations. It has rules and standards. Since garden variety commercial advertisements constitute 99 percent of its book of business, SEPTA rarely interferes with an advertiser's chosen message. Yet, its role in approving messages is not merely perfunctory. Thus, while an attorney generally may advertise her legal services, SEPTA, not surprisingly, has consistently prohibited any mention of representation for railroad, subway or bus injuries. SEPTA has also exercised its privilege to reject advertisements it considers offensive or in bad taste. For example, SEPTA recently disapproved a hosiery commercial with a scantily clad model proposed for a "wrap-around" display on a city bus.[2] SEPTA officials prohibited it as too risque for such a conspicuous space. SEPTA has clearly exercised its right to regulate advertising and to exclude messages which

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2. Such "wrap-around" advertisements envelop the entire circumference of the bus with a plastic-type cover providing a prominent method for reaching large numbers of potential customers.

are contrary to its standards. It has not created a public forum in its subway and train stations.

SEPTA, we conclude, is acting here as a proprietor and not as a lawmaker or regulator. It owns and is operating what is essentially a commercial venture, a public transportation system. SEPTA stations, where CBM's advertisements appeared, are designed to facilitate the rapid and inexpensive movement of commuters from one place to another. Commuters are there to travel, not to debate. The purpose of the SEPTA stations is not to promote the free exchange of ideas, and SEPTA has never indicated to the contrary.[3] *See Krishna*, 505 U.S. at 680-82. Like travelers in any station or terminal, they are a captive audience for any advertisement displayed. *See Lehman*, 418 U.S. at 302, 307. In sum, under the Supreme Court's analysis in *Lehman* and *Krishna*, SEPTA's subway and rail stations and their advertising space fit neatly within the category of a nonpublic forum.

## III

Since the SEPTA system is a nonpublic forum, the government may restrict access "based on subject matter and speaker identity so long as the distinctions drawn are reason-

3. To the extent it is relevant, the court takes judicial notice of some history. The Pennsylvania Railroad and the Philadelphia and Reading Railroad each built, in the nineteenth century, a system of commuter rail lines which are now part of SEPTA. They or their private successors owned and operated these two systems into the 1960's. While the Broad Street subway was constructed and owned by the City of Philadelphia, it was leased until some 30 years ago to a private company, first the Philadelphia Rapid Transit Company ("PRT"), and then the Philadelphia Transportation Company ("PTC"). The Market-Frankford elevated line has a more complicated history. The section between Frankford Avenue and Arch Street was built and owned by the City but leased successively to the PRT and PTC until the advent of SEPTA. The remainder of the line to 69th Street was constructed and owned privately. *See Krishna, supra* at 681.

able in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. SEPTA's decision to restrict access to a nonpublic forum "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Id.* at 808.

SEPTA and TDI argue that their actions meet this standard. They contend that removal of the plaintiff's antiabortion signs was a reasonable decision because they relied on the representation of a high government official in the United States Department of Health and Human Services. The letter of Dr. Philip Lee, Assistant Secretary of Health, warned that CBM's message that "women who choose abortion suffer more and deadlier breast cancer" is "unfortunately misleading, unduly alarming, and does not accurately reflect the weight of the scientific literature." SEPTA asserts that having received Dr. Lee's pronouncement it exercised sound judgment in removing an alarmist message trumpeting to the public inaccurate and misleading health information.

At trial, we heard extensive testimony from four experts concerning any links between abortion and breast cancer. Dr. Clark Heath, Dr. Lynn Rosenberg, and Dr. Polly Newcomb testified for SEPTA and TDI. Dr. Joel Brind testified for CBM.

Dr. Heath is a medical doctor and since 1988 has held the position of Vice President for Epidemiology[4] and Surveillance Research at the National Cancer Institute in Atlanta, Georgia. Dr. Heath is thoroughly familiar with the research concerning induced abortion as a possible risk factor for breast cancer. Dr. Rosenberg holds a doctorate in epidemiology and is currently a professor of epidemiology at the Boston University School of Medicine. Dr. Newcomb, a professor at the University of Wisconsin Medical School, holds a Ph.D. in epidemiology and a master's degree in public health. She is presently on staff at the Fred Hutchinson Cancer Research Center in Seattle,

4. Epidemiology is the science that deals with the incidence, distribution, and control of disease in a population.

Washington. Dr. Rosenberg and Dr. Newcomb have each co-authored studies about the causes of breast cancer.[5]

Drs. Heath, Rosenberg, and Newcomb all expressed the unequivocal opinion that existing epidemiological research does not support a cause and effect relationship between abortion and breast cancer. They specifically repudiated the statement that "women who choose abortion suffer more and deadlier breast cancer."

The experts discussed several factors underlying their conclusions. First, they cited the lack of consistency between the results of numerous studies on the subject.[6] While acknowledging that some studies support a weak association between induced abortion and breast cancer, they pointed out that others do not indicate any correlation at all. Second, most of the studies to date were "retrospective" in their design, as opposed to "prospective." That is, they focused on a woman's past medical history rather than follow women and their medical history into the future. Retrospective studies are more likely to produce biased results because of the potential that subjects in the study will inaccurately recall or report information. They also explained the effect of "confounding variables," that is, the possibility that other risk factors for breast cancer such as age or family history may influence the results of a study attempting to test the link between abortion and breast cancer.

Dr. Heath noted that among studies which are most comprehensive, including the studies of Dr. Rosenberg and Dr. Newcomb, the findings have not been particularly consistent. He concluded in his report:

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5. For example, Drs. Rosenberg and Newcomb have studied the relationship of breast cancer to such independent risk factors as alcohol and coffee consumption, cigarette smoke, oral contraceptives, breast implants, physical activity, multiple births, and abortion. In 1988, Dr. Rosenberg conducted a study published in the American Journal of Epidemiology entitled "Breast cancer in relation to the occurrence and timing of induced and spontaneous abortion." Dr. Newcomb is the author of one of the most recent and comprehensive studies on the subject of pregnancy termination and breast cancer, published in the Journal of the American Medical Association in 1996.

6. Approximately 23 studies have been conducted which include specific data on induced abortion and breast cancer incidence.

> Given this variability in study findings, coupled with the low levels of risk described and the many methodologic difficulties involved in all such research, it seems clear at present that no consistent association has been established and hence that no cause-effect relationships can be inferred. It also seems safe to suppose that, if increased risks do in fact exist, they are likely to be very small.

These experts also discussed the concept of relative risk value, that is, the percentage increase in the incidence of disease based on a particular risk factor.[7] For example, according to Dr. Newcomb, the relative risk of smoking as a factor in the incidence of lung cancer is approximately 22.0. Therefore, a person who smokes regularly is 22 times more likely to experience lung cancer than a person who does not smoke. In the scientific community, due to the size of the relative risk factor, it is widely accepted that smoking causes lung cancer.

In the epidemiology of breast cancer, there are two factors with positive risk associations clearly acknowledged to have a causal relationship: age and family history. In contrast to smoking and lung cancer, Dr. Newcomb's study produced a relative risk factor of only 1.23 between induced abortion and breast cancer. This means that for women without a history of induced abortion, one in one hundred would suffer from breast cancer. For women with a history of an induced abortion, 1.23 women out of one hundred would contract breast cancer. All three experts testified that a relative risk value in the range of 1.23 is an extremely weak association. Dr. Newcomb stated in her expert report:

> Because, our study results were equivocal, likely biased, and consistent with an extensive literature which has been unable to establish a clear link between abortion and breast cancer, . . . I must repudiate any implication that our study supports this interpretation. In addition, our study did not evaluate breast cancer mortality, so we provide no information on survival in women with a history of induced abortion . . . .

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7. Epidemiologists use a scale centered at 1.0 to measure relative risk associations. A relative risk value over 1.0 is a positive association; a relative risk value below 1.0 is a negative association.

CBM presented as its expert Dr. Joel Brind, who testified that there is a causal link between induced abortion and the incidence of breast cancer. Dr. Brind has a Ph.D. in biochemistry and is a professor of biology and chemistry at Baruch College. He has written extensively in the lay press, such as the National Right to Life News, on the subject of abortion and breast cancer. While Dr. Brind has published scientific studies in peer review journals in other areas, he has never conducted research on the epidemiology of breast cancer. He is not an epidemiologist. He has, however, authored a study entitled "Induced Abortion as an Independent Risk Factor for Breast Cancer: a Comprehensive Review and Meta-analysis," which is scheduled to be published by a British peer review journal later this year. This "meta-analysis" is a review of 23 published epidemiological studies which address a correlation between induced abortion and breast cancer.

In his meta-analysis, Dr. Brind argued that of 23 independent studies, 12 studies, including Dr. Newcomb's, reported a statistically significant increase of breast cancer risk among women with a history of induced abortions.[8] Taking all the studies in his meta-analysis together, he found an average relative risk factor of 1.3. This increased risk, according to Dr. Brind, could not be attributed to bias such as underreporting of abortion history by the women in the studies. He further maintained that his meta-analysis accounted for "confounding" factors and showed a specific independent risk factor for induced abortion. He concluded that the preponderance of the published evidence on this topic supports a causal relationship between induced abortion and breast cancer.

Dr. Brind testified that a relative risk value of 1.3 for increased risk of breast cancer is sufficiently significant so that the public should be alerted. He noted that although the relative risk of oral contraceptives for increased incidence of breast cancer is only 1.1, manufacturers of birth control pills provide this information to consumers on the warning label. CBM's message is not misleading, he urged, when the relative risk factor is at least as great as that for oral contraceptives.

Dr. Brind also cited three studies for the position that abortion causes "deadlier breast cancer." According to Dr.

8. Six other studies showed positive associations, but not within the 95 percent certainty required to show statistical significance.

Brind, a 1983 study[9] by H.E. Ownby and others found that women who had had at least one abortion had a higher recurrence rate of breast cancer within three years than patients who had no abortion history. He relied on the Ownby study for the proposition that those patients with an abortion history had more malignant cancer than those who had never had an abortion.

Drs. Heath, Rosenberg, and Newcomb vigorously disputed the findings in Dr. Brind's meta-analysis as well as his use of this methodology here. They questioned its accuracy here where nearly all of the studies are retrospective as opposed to prospective. Primarily, however, Drs. Heath, Rosenberg, and Newcomb disagreed with the conclusions Dr. Brind drew from the study data. While acknowledging that many studies show a weak positive association between abortion and breast cancer, they maintained that the association is not meaningful evidence of a cause and effect link. Finally, they rejected Dr. Brind's interpretation that any of the three studies upon which he relied supported the notion that abortion causes "deadlier" breast cancer.

It is undisputed that SEPTA relied solely on Dr. Lee's letter in making its decision to remove CBM's posters. Admittedly, SEPTA did not do research of its own on any link between abortion and breast cancer. CBM contends that SEPTA's reliance on Dr. Lee's letter alone was an insufficient basis to withdraw CBM's posters. We disagree. The legal standard is whether SEPTA acted reasonably. It does not have to be the most reasonable or the only reasonable decision. *Cornelius,* 473 U.S. at 808. We find that it was reasonable for SEPTA, a transportation authority with no medical expertise, to rely solely on the medical opinion of a physician who is a high government health official. It had no duty to investigate further before taking action. In any event, the testimony of Drs. Heath, Newcomb, and Rosenberg, all leading experts in the field of epidemiology, confirms that SEPTA's decision to eliminate the antiabortion signs was justified.

In reaching this conclusion, this court, of course, takes no position regarding the underlying scientific and medical question involved. Specifically, we do not decide whether Drs. Lee,

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9. This was a study of 238 breast cancer patients who had been pregnant.

Heath, Rosenberg, and Newcomb, on the one hand, or Dr. Brind, on the other, is right. The connection between abortion and breast cancer may be an issue which scientists and physician's will debate for years to come. Ultimately, a consensus may develop. At this time, we do not know. We decide only that based on the current state of scientific and medical knowledge, SEPTA did not act unreasonably in excluding CBM's "health" message as inaccurate and misleading. In sum, it was reasonable for SEPTA to respond in a way that was consistent with the views of Dr. Lee, Dr. Heath, Dr. Rosenberg, and Dr. Newcomb.

IV

In order to pass constitutional muster, SEPTA's decision must not only be reasonable. It must also be "viewpoint neutral." *Cornelius,* 473 U.S. at 806. Defendants submit that they have not discriminated against CBM's message based on its antiabortion viewpoint. We agree. SEPTA has permitted advertising in subway and rail stations on both sides of the abortion debate. SEPTA has allowed messages advocating a woman's right to choose abortion and advertisements for medical clinics providing pregnancy termination services. On the other hand, SEPTA has run numerous contrary advertisements. For example, there have been signs urging teenagers to practice abstinence, offering counseling services to pregnant women, and encouraging pregnant woman to consider adoption as an alternative to terminating a pregnancy. One advertisement, which espoused the antiabortion cause, stated:

> For answers to your questions about: . . . Abortion — Making a Decision, Call State Health Line . . . for free booklet on fetal development. *Fetus is Latin for little one- A little human is a baby* . . . .

[emphasis added]. CBM has presented no evidence that SEPTA has discriminated against it based on the content of its message. On the issue of abortion SEPTA has been "viewpoint neutral." *Cornelius,* 473 U.S. at 806.

V

We can easily dispose of CBM's remaining arguments. CBM contends that SEPTA admitted in a memorandum dated February 14, 1996 from Mr. Gambaccini to SEPTA board members that CBM's message was protected by the First Amendment. The memorandum included the statement: "Our legal department, after reviewing the ad, concluded that the advertiser has a right to purchase the space and that the speech is protected under the First Amendment." Whatever the initial opinion of the SEPTA legal department on that particular date, clearly SEPTA has changed its mind. In any event, we are not bound by the one-time legal opinions of lawyers.

CBM has not met the threshold showing to obtain injunctive relief, namely, that it succeeds on the merits of its First and Fourteenth Amendment claims. CBM has also not seriously pursued the claims stated in its complaint under 42 U.S.C. §§ 1985 and 1986. They have no merit and we do not address them here.

Nor may CBM recover on its breach of contract claim. Section IV of the TDI-CBM contract clearly provides for the termination of the contract:

> b. If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if [SEPTA] should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

The contract permits the termination that occurred in this case. TDI refunded to CBM any money paid for the time the signs were not posted. We will not permit CBM to recover for the money it spent to make the signs. CBM assumed this risk by entering a contract where TDI had the right to cancel at the discretion of SEPTA based on the content of the advertisement.

## VI

In conclusion, we will enter judgment in favor of defendants Southeastern Pennsylvania Transportation Authority and Transportation Displays, Inc. and against plaintiff Christ's Bride Ministries, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| CHRIST'S BRIDE MINISTRIES, INC. | : | CIVIL ACTION |
| v. | : | |
| SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, et al. | : | NO. 96-3631 |

**ORDER**

AND NOW, this 16th day of August, 1996, based on the court's findings of fact and conclusions of law, it is hereby ORDERED that judgment is entered in favor of defendants Southeastern Pennsylvania Transportation Authority and Transportation Displays, Inc. and against plaintiff Christ's Bride Ministries, Inc.

BY THE COURT: